Comments

The California Supreme Court Swings and Misses in Defining the Scope and Enforceability of Premarital Agreements

By JOHN G. GHERINI*

AS THE END of August 2000 neared and fall approached, the boys of summer stretched out their season and rallied momentum to win baseball's greatest prize—a ticket into the post season. The San Francisco Giants, outfitted with a new stadium, accepted the challenge and charged into first place in Major League Baseball's National League West Division led by their future hall of fame left fielder Barry Bonds.[1] But as Bonds geared up for the post season, his attorneys geared up for a showdown with the California Supreme Court on the enforceability of a premarital agreement he entered into with his ex-wife. Just as Bonds was making a statement on the field for the Giants, the California Supreme Court made a statement off the field as it issued decisions in *In re Marriage of Bonds*[2] and *In re Marriage of Pendleton*[3] on the same day. Both decisions dealt with prenuptial agreements[4] and sought to clarify contradictory decisions in the state's courts of appeal.

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* Class of 2002. The author wishes to thank his mother, Mary-Ann Gherini, for her unconditional support and encouragement. This Comment is dedicated to John F. Gherini, an exceptional father and role model, who has proved to be an invaluable resource throughout the publication process.

1. *See* Carl T. Hall, *Bonds and The Babe, Giants slugger's season rivals Ruth's prodigious 1920 output, statistical analysis shows.* S.F. CHRONICLE, Sept. 5, 2001, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=chronicle/archive/20019/05/MN46610.DTL.

2. 5 P.3d 815 (Cal. 2000).

3. 5 P.3d 839 (Cal. 2000).

4. A prenuptial agreement may be referred to as an antenuptial agreement, antenuptial contract, premarital contract, premarital agreement, or a marital settlement. *See* BLACK'S LAW DICTIONARY 1200 (7th ed. 1999). A prenuptial agreement is defined as "[an] agreement made before marriage [usually] to resolve issues of . . . property division if the marriage ends in divorce or by death of the spouse." *Id.* Hereinafter, antenuptial agreements or premarital agreements will be referred to as prenuptial agreements.

The use of prenuptial agreements has always been met with varying degrees of skepticism. Viewed "as the province of the wealthy, the age disparate, the heartless, or the simply greedy, prenuptial agreements are often regarded with distrust and hostility."[5] Despite such criticisms, society generally accepts prenuptial agreements as an appropriate device for protecting property in the event of a divorce.[6] In the last half century, divorce rates rose to a staggering fifty percent.[7] Not surprisingly, the use of prenuptial agreements tripled in the period from 1978 to 1988, and continues to rise.[8]

To comply with the changing tide of public opinion regarding the use of prenuptial agreements, the California legislature took two definitive steps to sanction their use. First, the legislature passed the Family Law Act of 1969.[9] This measure allowed no fault divorce and repealed the previous law requiring a showing of fault or liability by one spouse against the other to obtain a dissolution.[10] Second, and more importantly, the legislature adopted the Uniform Premarital Agreement Act of 1985[11] ("UPAA"). The UPAA contains express provisions regulating the use of prenuptial agreements regarding the distribution of spousal property after a dissolution.[12]

In interpreting the scope of the UPAA, California courts have struggled to square the new social acceptance of prenuptial agreements with a common law that traditionally favored marriage and disapproved of contracts disseminating property upon divorce.[13]

5. Allison Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 888 (1997).

6. *See generally* Lenore Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169 (1974) (arguing that traditional state interests in the continuation of marriages for life have given way to new opinions of the institution that may render such state concerns obsolete).

7. *See* Alex Shukhman, *Show Her the Money: The California Court of Appeal's Mistake Concerning In re Marriage of Bonds*, 20 LOY. L.A. ENT. L.J. 457, 457–58 (2000).

8. *See* Marston, *supra* note 5, at 891.

9. CAL. CIV. CODE §§ 4000–5138 (Deering 1984).

10. CAL. CIV. CODE § 4000 (Deering 1984), *repealed by* CAL. FAM. CODE § 2550 (West 1994).

11. CAL. FAM. CODE §§ 1600–1617 (West 1994).

12. *See* CAL. FAM. CODE § 1615 (West 1994). *But see* CAL. FAM. CODE § 1612 (West 1994) (where the California Senate deleted a portion of the Uniform Act that allowed for spousal support waivers).

13. *See generally* Loveren v. Loveren, 39 P. 801 (Cal. 1895) (holding that any contract that has for its object the dissolution of marriage or the facilitation thereof is void as against public policy); Hill v. Hill, 142 P.2d 417 (Cal. 1943) (describing the common law as invalidating any contract that had the direct tendency to promote dissolution). *But see In re* Marriage of Dawley, 551 P.2d 323 (Cal. 1976) (holding that a contract violates public policy only insofar as *its terms* promote dissolution).

California's Supreme Court has addressed the issue several times and its decisions have marked the slow evolution of the common law.[14] The *Bonds* and *Pendleton* decisions are the California Supreme Court's most recent attempts to clearly define the role of premarital agreements. Since the adoption of the UPAA and prior to these decisions, critics argued that the court's decisions were ambiguous and failed to clearly define what was required to create an enforceable prenuptial agreement.[15]

This Comment argues that the California Supreme Court's failure to articulate a usable standard creates a problematic holding that will lead to continued difficulties in the implementation of UPAA sections. Part I surveys the origins and evolution of the common law in the twentieth century, specifically focusing on the changes made by the California Supreme Court prior to the adoption of the UPAA.

Part II initially focuses on how the California legislature adopted the UPAA and looks at *Bonds* and *Pendleton* to examine the court's interpretation of the California Uniform Act and modification of the common law. Specifically, this section takes an in depth look at the *Bonds* decision—paying heed to the factual circumstances—to discern what standard, if any, the court created regarding the enforceability of premarital agreements. This section also reviews the *Pendleton* decision and analyzes how the court used a fact based analysis similar to *Bonds*, but applied that reasoning to a determination of whether spousal support waivers were enforceable.

Part III focuses on the legislative response to *Bonds* and *Pendleton*. This section lays out the changes that the legislature has made to California law regarding the enforceability of prenuptial agreements, and argues that although the changes are a good start, there are still several issues that present problems for those who seek to create enforceable agreements. Ironically, the issues that persist are similar to those that were created by *Bonds* and *Pendleton*.

Finally, Part IV explains that the legislature or the court should articulate what factors must be followed to create an enforceable agreement. Leaving discretion with trial courts leaves the bar and the bench in the dark when trying to determine what issues are pertinent

14. *See generally In re* Marriage of Higgason, 516 P.2d 289 (Cal. 1973) (finding a contract void unless it was made in the contemplation of marriage); *In re* Marriage of Dawley, 551 P.2d 232 (Cal. 1976) (rejecting dicta in *Higgason* that agreements are void if they facilitate divorce as a misstatement of California law).

15. *See* Marston, *supra* note 5, at 913 (recognizing that courts need to more accurately define what factors lead to enforceable contracts).

in drafting a prenuptial agreement. Finally, if no changes are made by the court or legislature, this section sets forth what guidelines should be followed by practitioners to carry their burden in drafting enforceable agreements.

I. Background

The California Supreme Court's recent decisions in *Bonds* and *Pendleton* are best understood in the context of the court's past decisions on the enforceability of premarital agreements under the common law. The *Bonds* court began its analysis by explaining that "[f]rom the inception of its statehood, California has retained the community property law that predated its admission to the Union" which contained the general rule that property acquired during the marriage was community property.[16] The community property doctrine that spouses evenly share property acquired during the marriage served as the starting point for California common law.

The court's decisions in this area have evolved throughout the twentieth century as the legislature has carved away at the general common law rule stated above.[17] The *Pendleton* court emphasized this point by relying on common law to determine the enforceability of spousal support waivers.[18] In *Bonds*, the court repeatedly referenced California common law cases in an effort to qualify its interpretation of the UPAA.[19]

A. Common Law of Marital Contracts at the Turn of the Century

Since the turn of the twentieth century, the state has had a paramount interest in the preservation of marriage.[20] The California Supreme Court explained that the "preservation of the marriage relationship is considered essential to the maintenance of organized society . . . ."[21] California's legislature addressed this interest by passing statutes that restricted a married couple's ability to contract with each other over the distribution of property. Former section 159 of the California Civil Code provided that "[a] husband and wife cannot,

16. *Bonds*, 5 P.3d 815, 821 (Cal. 2000).

17. *See id.* ("There is nothing novel about statutory provisions recognizing the ability of parties to enter into premarital agreements regarding property, because such agreements long were common and enforceable under English law, and have enjoyed a lengthy history in this country.").

18. *See Pendleton*, 5 P.3d 839, 843–47 (Cal. 2000).

19. *See Bonds*, 5 P.3d at 821–22.

20. *See* Weitzman, *supra* note 6, at 1170.

21. Hill v. Hill, 142 P.2d 417, 417–19 (Cal. 1943).

by any contract with each other, alter their legal relations . . . except that they can agree to an immediate separation, and may make provision for the support of either of them and of their children during such separation."[22] Although the statute allowed separation, it expressly forbade the parties from entering into a prior contract altering their legal relationship.

For the first half of the twentieth century, the California Supreme Court supported public policy goals laid out by the legislature that discouraged parties from altering their marital rights through contracts, because such contracts encouraged divorce. In *Loveren v. Loveren*,[23] the California Supreme Court invalidated a marital contract entered into after separation because it violated public policy.[24] During the pendency of the divorce action, the Loverens contracted as to how their property was to be distributed.[25] Shortly thereafter, Ms. Loveren became dissatisfied with the agreement and challenged its validity.[26] The court explained that "[t]he authorities are uniform in holding that any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result . . . is void as *contra bonos mores*[27] . . . ."[28]

California's high court followed this reasoning in *Pereira v. Pereira*[29] which involved a contract entered into during the marriage.[30] The contract stipulated that the husband would have to pay a set amount of money if the wife desired a divorce.[31] The court found the practical effect of the agreement was that the husband "was left free to inflict upon his wife the most grievous marital wrongs, such as would compel her to obtain a divorce,"[32] and he would be assured that the agreed sum would compensate the wife for her injuries.[33] The court held the contract void as against public policy because it would encourage or facilitate divorce.[34]

22. *See former* CAL. CIV. CODE § 159 (Deering 1960).
23. 39 P. 801 (Cal. 1895).
24. *See id.* at 802.
25. *See id.* at 801.
26. *See id.*
27. *Contra bonos mores* describes something that is "[o]ffensive to the conscience and to a sense of justice." BLACK'S LAW DICTIONARY 318 (7th ed. 1999). Such contracts are regarded as voidable by the courts. *See id.*
28. *Loveren*, 39 P. at 802.
29. 103 P. 488 (Cal. 1909).
30. *See id.* at 489.
31. *See id.*
32. *Id.* at 490.
33. *See id.*
34. *See id.*

B. Common Law Is Extended to Prenuptial Contracts

Early cases addressing the enforceability of marital contracts primarily involved agreements made after the parties had separated or, as in *Pereira*, after the marriage had begun. Courts were not afraid to strengthen these common law principles and extend them to cases involving contracts entered into before marriage.[35] One appellate court noted that any distinction between these circumstances would be foolish: "[i]f contracts of this nature tend to facilitate the dissolution of the marriage relation, then they should not be sanctioned by the courts, irrespective of the time of their execution."[36]

The California Supreme Court agreed with this reasoning and made a similar pronouncement in *Barham v. Barham*,[37] in which the parties executed a prenuptial agreement. The couple subsequently separated and then remarried. The court found that since the separation was a completion of the first marriage, the court had to decide whether the prenuptial agreement from the first marriage applied to the second marriage.[38] The court noted that "[p]ublic policy seeks to protect marriage, to encourage parties to live together, and to prevent separation."[39] The court invalidated the contract, regardless of its applicability to the second marriage, as being against the principle that "a contract providing 'against liability for a contemplated wrong to be subsequently inflicted' by one of the spouses upon the other and liquidating 'such liability in advance,' was declared a 'menace to the marriage relation and should not be tolerated . . . .'"[40] Under *Barham*, the California Supreme Court essentially banned any prenuptial agreements because "no-fault divorces" were not permitted.[41]

C. Evolution of the Common Law of Prenuptial Agreements

Substantial societal changes occurred between the California Supreme Court's 1944 decision in *Barham*, and its 1973 decision in *In re Marriage of Higgason*—the court's next visit to the realm of prenuptial

35. See Whiting v. Whiting, 216 P. 92, 94 (Cal. 1923); Barham v. Barham, 202 P.2d 289, 296 (Cal. 1923).

36. *Whiting*, 216 P. at 96.

37. 202 P.2d 289 (Cal. 1949).

38. *See id.* at 291–94.

39. *Id.* at 296 (quoting Hill v. Hill, 142 P.2d 417, 422 (Cal. 1943)).

40. *Id.* at 296 (citing *Whiting*, 216 P. at 96).

41. If *Barham* prevented contracts based on future liability, and only divorces based on liability would be recognized, then no prenuptual agreements would be allowed.

agreements.[42] During this period, the California legislature adopted the Family Law Act of 1969[43] which allowed for no-fault divorces. By allowing a dissolution to occur without liability falling on any one party, the legislature undercut the California Supreme Court's rationale in *Barham.* Additionally, the legislature enacted laws that gave the courts power to award spousal support and attorneys' fees in a dissolution proceeding.[44] The new legislative scheme encouraged parties to contract as to such rights to prevent a court from imposing duties to pay.[45]

In re Marriage of Higgason[46] presented a factually interesting case. A wealthy seventy-three year old woman married a forty-eight year old waiter.[47] The couple executed a prenuptial agreement that was subsequently challenged by the husband after the couple separated.[48] The California Supreme Court modified the common law in light of the legislature's activities.[49] The court decided to uphold prenuptial agreements, to the extent they related to the disposition of property.[50] Conversely, any agreement that altered the support obligations owed to a spouse would be found invalid.[51]

In what has come to be the *Higgason* decision's most highly criticized statement,[52] the court, in enumerating the factors to consider in upholding a prenuptial agreement, explained that "such an agreement must be made in contemplation that the marriage relation will continue until the parties are separated by death."[53] The court noted that "[c]ontracts which facilitate divorce or separation" are void as against public policy.[54] There are several problems with this reasoning. First, it required courts to look to the subjective intent of the parties entering into the agreement to ensure that the parties made the document in contemplation of the continuation of the mar-

42. *See generally* Weitzman *supra* note 6, (noting that people's opinions were changing about the role of premarital agreements).

43. CAL. CIV. CODE §§ 4000–5138 (West Supp. 2001).

44. *See id.*

45. *See id.*

46. 516 P.2d 289 (Cal. 1973).

47. *See id.* at 290.

48. *See id.* at 293.

49. *See id.*

50. *See id.* at 295.

51. *See id.* at 296–97.

52. *See In re* Marriage of Dawley 551 P.2d 323, 329 (Cal. 1976).

53. *See Higgason,* 516 P.2d at 295.

54. *Id.*

riage.[55] Second, it required courts to determine what was meant by "facilitate divorce or separation" without any guidelines.[56]

Just three years after it handed down the *Higgason* decision, the California Supreme Court revisited the area of enforceable prenuptial agreements. In *In re Marriage of Dawley*,[57] Betty Johnson was a public school teacher who became pregnant.[58] She feared that she would lose her job if she had a child born out of wedlock.[59] Betty convinced her boyfriend, James Dawley, to marry her.[60] James insisted that Betty enter into a prenuptial agreement to protect his property in the future.[61] The agreement secured each party's independent holdings prior to marriage, as well as their earnings during that time.[62] Betty argued, based on *Higgason*, that the parties did not make the agreement in contemplation of marriage and therefore it was void.[63] The court rejected her argument and amended the *Higgason* decision, holding that the state's interest in protecting marriage only required that "the courts refuse to enforce specific contractual provisions which by their terms seek to promote the dissolution of a marriage."[64]

The court went to great lengths to clarify *Higgason*. It observed that the subjective test of *Higgason* was certainly ambiguous and failed to protect any agreement, as the challenging spouse could claim that he or she entered the contract without contemplating marriage.[65] The court ultimately held that a prenuptial agreement "violates the state policy favoring marriage only insofar as its terms encourage or promote dissolution."[66] The court expressly rejected the dictum in *Higgason* regarding the contemplation of marriage requirement.[67]

The importance of the 1976 *Dawley* decision is not to be overlooked. It was the California Supreme Court's last examination of prenuptial agreements before it heard the *Bonds* and *Pendleton* cases. In deciding these cases, the court relied heavily on its reasoning in *Dawley*. Although the *Dawley* court was more accepting of prenuptial agree-

55. *See Dawley*, 551 P.2d at 328.
56. *See In re* Marriage of Pendleton, 5 P.3d 839, 844 n.5 (Cal. 2000).
57. 551 P.2d 323 (Cal. 1976).
58. *See id.* at 325.
59. *See id.* at 326.
60. *See id.*
61. *See id.*
62. *See id.* at 327.
63. *See id.* at 327–28.
64. *Id.* at 328.
65. *See id.* at 329.
66. *Id.* at 329.
67. *See id.* at 330.

ments than early common law holdings, it still left several stones unturned. Specifically, the court made only general statements about prenuptial agreements and did not specifically address the waiver of spousal support. While *Dawley* limited an enforceability inquiry to the terms of the agreement, it failed to adequately address what factors should be considered in determining whether an agreement is enforceable.

II. Problem: Adoption and Interpretation of the UPAA

After its 1976 decision in *In re Marriage of Dawley*, the California Supreme Court did not decide another prenuptial agreement case until after the adoption of the Uniform Premarital Agreement Act.[68] In *Bonds*, the court pointed out that the UPAA recognized that "there was some uncertainty and considerable lack of uniformity regarding the circumstances under which such [prenuptial] agreements would be enforce[d]" in varying states.[69] The Uniform Act was adopted by the National Conference of Commissioners on Uniform Laws to create unambiguous uniform standards to guide states in determining what factors are relevant in judging the enforceability of prenuptial agreements.[70] California adopted the Uniform Act in 1985 with a few small but significant changes.[71]

A. The Act as Adopted in California

The court in *Bonds* stated that the "California enactment, like the Uniform Act, sets out the law of premarital agreements, including such matters as the nature of property subject to such agreements, the requirement of a writing, and provision for amendments."[72] Most importantly, section 1615 of California's Family Code, like section 6 of the Uniform Act, governs the enforceability of premarital agreements. Section 1615 provides that:

> (a) A premarital agreement is not enforceable if the party against whom enforcement is sought provides either of the following:
> (1) That party did not execute the agreement voluntarily.
> (2) The agreement was unconscionable when it was executed and, before execution of the agreement, all of following applied to that party:

68. *See* 9B U.L.A. 369 (1987).
69. *In re* Marriage of Bonds, 5 P.3d 815, 822 (Cal. 2000).
70. *See* UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987).
71. *See* CAL. FAM. CODE §§ 1600–1617 (West Supp. 2001).
72. *Bonds*, 5 P.3d at 822.

> (A) That party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party.
> (B) That party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided.
> (C) That party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.[73]

Significantly, the *Bonds* court found this language was "intended to [enhance] the enforceability of premarital agreements and to convey the sense that an agreement voluntarily entered into would be enforced without regard to the apparent unfairness of its terms."[74]

Some legal practitioners have rightfully noted that the way in which section 1615(a) was drafted greatly reduces the likelihood that a court will decide a challenge to a premarital agreement under section 1615(a)(2) on the basis that the agreement was unconscionable.[75] This is due in large part to the fact that "1615(a) is written in the disjunctive, so that a premarital agreement is unenforceable if either of the two enumerated bases for challenging its validity is established . . . ."[76] Section 1615(a)(2), however, is written in the conjunctive requiring proof that both the agreement was unconscionable and that the party did not have actual knowledge of the other party's material assets.[77] Thus, a court must enforce an agreement that may be unconscionable on its face as long as there was full disclosure of party assets.[78] For this reason, most challenges will come under section 1615(a)(1). This emphasizes the role of the *Bonds* decision because of its effect on this section.

The court in *Pendleton* addressed another difficult section of the Uniform Act in deciding whether a court may enforce a waiver of spousal support.[79] The court looked to section 1612,[80] which specifies the permissible objects of a premarital agreement. When it was first introduced in California, section 1612 of the Uniform Act included a subsection[81] that allowed the "modification or elimination of spousal support."[82] Before the Act was enacted, the California Senate deleted

73. CAL. FAM. CODE § 1615(a) (West Supp. 2001).
74. *Bonds*, 5 P.3d at 824.
75. *See* Dennis Wasser, *Prenuptial Disagreements*, L.A. LAW. 26 (Dec. 23, 2000).
76. *Id.* at 28.
77. *See id.*
78. *See id.*
79. *See In re* Marriage of Pendleton, 5 P.3d 839, 840 (Cal. 2000).
80. *See* CAL. FAM. CODE § 1612 (West Supp. 2001).
81. *See* CAL. FAM. CODE § 1612(a)(4).
82. *See* S. 1143, 1985–1986, Reg. Sess. (Cal. 1985).

this section.[83] The court in *Pendleton* had to determine whether this deletion evinced legislative intent to render spousal support waivers unenforceable or whether it reserved that determination for the courts.

Despite the intent of the original drafters of the Uniform Act to fashion a law that allowed for more consistent rulings throughout the states regarding premarital agreements, the Act's presence in California has done little to simplify the process. The California Supreme Court's rulings in *Bonds* and *Pendleton* show that there are still many issues the court must resolve.

B. The California Supreme Court in *In re Marriage of Bonds*

1. The Trial Court's Findings of Fact

The facts of the *Bonds* case provide some of the most important factors for understanding the ramifications of the California Supreme Court's ultimate decision regarding the enforceability of prenuptial agreements. The court narrowed its decision to the issue of whether independent counsel is required to enforce a prenuptial agreement.[84] In reaching the conclusion that it is not, the court held that the determination of whether the parties entered into a contract voluntarily is a question of fact and that determination will be sustained on appeal as long as it is supported by substantial evidence.[85] Thus, the court failed to define a clear rule of enforceability and instead used the facts of *Bonds* to outline which factors are important to the analysis.

In re Marriage of Bonds details a love affair that transpired over a very short period of time. The marriage at issue was between Barry Bonds, a professional baseball player, and Susan Bonds, known as Sun, who emigrated from Sweden to Canada where she met Barry.[86] Barry and Sun knew each other for less than three months before becoming engaged.[87] Wanting to marry before Major League Baseball's spring training season began, Barry and Sun decided to wed in Las Vegas after knowing each other for a year.[88] At trial, Barry and Sun offered conflicting evidence on what occurred just prior to and during the signing of their prenuptial agreement.[89]

83. *See* Amendment to S. 1143, 1985–1986, Reg. Sess. (Cal. 1985).
84. *See In re* Marriage of Bonds, 5 P.3d 815, 816 (Cal. 2000).
85. *See id.* at 838.
86. *See id.* at 816–17.
87. *See id.* at 817.
88. *See id.*
89. *See id.* at 818–19.

The trial court made the following findings of fact. First, one week prior to signing the agreement, Barry's lawyer, Leonard Brown, met with Sun and advised her of her right to obtain her own counsel and told her that he represented Barry and not her.[90] Second, Sun at no time questioned the signing of the agreement, nor did she ever express any intent not to sign it.[91] Third, Barry fully and properly disclosed the nature and approximate value of all his current assets.[92] Fourth, Barry and Sun did not have a confidential relationship prior to entering into this agreement because there was no evidence that Sun relied on Barry for financial advice.[93] Finally, and most importantly, the trial court found that Sun had sufficient knowledge of her rights to community property during marriage and she understood that entering into this agreement would adversely affect those rights.[94]

In addition, there were some facts on the record that detailed just how little preparation went into this agreement. The parties signed the agreement one day before they were to be married in Las Vegas.[95] The agreement was full of typos and immaterial mistakes, apparently due to time constraints.[96] Sun was accompanied at the meeting by a friend from Sweden who had a limited command of English.[97] The controversial part of the agreement waived any right either spouse had in the future earnings of the other spouse.[98] Subsequent to entering into the marriage, Barry's income dramatically increased—from $106,000 a year to well over two million dollars by 1990.[99]

Taken together, these facts show an unusual predicament, greatly complicated by self-imposed time constraints. The unwary reader may interpret these facts as showing that Sun was taken advantage of by the time constraints and legal drafting of Bond's attorney. From such a presumption one could conclude that if these facts show a voluntary agreement, it is hard to imagine factors that would make an agreement involuntary. But a closer reading of the decision cautions against such reasoning. There are several warnings given by the court that

90. *See id.* at 820.
91. *See id.*
92. *See id.*
93. *See id.*
94. *See id.* at 821.
95. *See id.* at 818.
96. *See In re* Marriage of Bonds, 83 Cal. Rptr. 2d 783, 798 (1999).
97. *See Bonds*, 5 P.3d at 818.
98. *See id.* at 818 n.1.
99. *See id.* at 817.

one must take into account to ensure that an agreement will be enforceable.

2. The Court Holds That Lack of Independent Counsel Does Not Automatically Mean the Agreement Was Entered into Involuntarily

The court used California's version of the Uniform Act to determine what factors were necessary to enforce a prenuptial agreement. Family Code section 1615, described above, requires that the parties enter into the contract voluntarily.[100] The court recognized that neither the Family Code nor the history of the Uniform Act contained any information on the meaning of the term "voluntary."[101] However, several cases from different states, cited in the Uniform Act's history, used a number of factors to determine voluntariness.[102] The court listed the following factors as relevant to this analysis:

> [C]oercion that may arise from the proximity of execution of the agreement to the wedding, or from surprise in the presentation of the agreement; the presence or absence of independent counsel or of an opportunity to consult independent counsel; inequality of bargaining power[;] . . . whether there was full disclosure of assets; and the parties' understanding of the rights being waived . . . .[103]

The court noted that the lack of independent counsel was only one factor to be weighed in determining voluntariness, and that it was not dispositive of coercion.[104] Most significantly, the court noted that requiring independent counsel would shift the burden of proof from the person challenging the agreement to the person defending.[105] Such a result would directly violate the statute which "expressly places the burden upon the party challenging the voluntariness of the agreement."[106]

The court was also persuaded by the comments to the Uniform Act, in which one commissioner stated, "[n]othing in [the enforcement section] makes the absence of assistance of independent legal counsel a condition for the unenforceability of a premarital agreement."[107] The court repeated that the purpose of the Uniform Act

100. *See* CAL. FAM. CODE § 1615 (Deering 1999).
101. *See Bonds*, 5 P.3d at 823.
102. *See id.* at 825; *see also id.* at 824 n.5 (describing the various state court decisions discussing the meaning of the term "voluntary").
103. *Id.* at 824–25.
104. *See id.* at 828.
105. *See id.* at 829.
106. *Id.*
107. *Id.* at 827.

"was to enhance the enforceability of premarital agreements, a goal that would not be furthered if agreements were presumed to be of doubtful voluntariness unless both parties were represented by independent counsel."[108] The court concluded that, although lack of independent counsel was an important factor, the agreement was not per se unenforceable simply because both parties were not duly represented.[109] By rejecting the appellate court's test—that strict scrutiny would be used whenever there was not independent counsel—the *Bonds* court required an analysis of all the facts to determine whether the agreement was voluntary. The court highlighted a few of the factors it felt were relevant but left a great deal of discretion with the trial courts.[110]

3. Relevant Factors in Determining Voluntariness

The California Supreme Court first stated that "[i]n determining the voluntariness of a premarital agreement, a reviewing court should accept such factual determinations of the trial court as are supported by substantial evidence."[111] The court then looked to the findings of the trial court to determine whether the relevant facts were backed by substantial evidence.[112] The California Supreme Court's factual conclusions, while confined to the facts of the *Bonds* case, shed the most light on what factors a practitioner should consider when drafting prenuptial agreements to ensure their enforceability.

The court found that the "temporal proximity of the wedding to the signing of the agreement was not coercive,"[113] despite a statement that a close proximity of time between the signing of the agreement and the actual marriage ceremony would be viewed as coercion.[114] There are few situations in which this time period is shorter than it was in *Bonds*. There, the agreement was signed just prior to getting on the plane to Las Vegas where the couple was to be married the next day.[115] The court found that the time period was sufficient because "the coercive force of the normal desire to avoid social embarrassment or humiliation was diminished or absent"[116] as the wedding ceremony

108. *Id.* at 828.
109. *See id.* at 829.
110. *See id.* at 837–38.
111. *Id.* at 834.
112. *See id.* at 838.
113. *Id.* at 834.
114. *See id.* at 824.
115. *See id.* at 818.
116. *Id.* at 835.

involved a small group of people and would have been easy to postpone.[117]

Second, the court found that although Sun lacked independent counsel, she did have a reasonable period of time to obtain counsel.[118] It was well documented that a week prior to entering the agreement, Attorney Brown informed Sun that she was entitled to obtain her own counsel and Sun declined the invitation.[119] The court also disagreed with the appellate court's decision that Sun's failure to get counsel was caused by her inability to pay legal fees,[120] concluding, "the presentation of the agreement did not come as a surprise to Sun"[121] and she declined to get counsel because she understood the agreement.[122]

Third, the court found that Barry's attorneys told Sun about the "basics of community property law, . . . that she would be disavowing the protection of community property law by agreeing that income and acquisitions during the marriage would be separate property."[123] Thus the court concluded that even though Sun was not represented by counsel, she understood her rights and which of those rights she was waiving by signing the agreement.[124]

Fourth, the court found the bargaining power of the parties to be equal—despite the fact that English was not Sun's native language—based on the trial court's conclusion that she understood the terms of the agreement.[125] The California Supreme Court agreed, holding that Sun's English skills were sufficient in light of her employment and education.[126] The court further determined that the agreement's con-

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* at 836.

121. *Id.* at 835.

122. *See id.*

123. *Id.* at 835–36.

124. *See id.* at 833. The suggestion that counsel for one party should inform the other unrepresented party about community property law may create ethical problems for the drafting attorney. Judge Ruvolo dissented in the *Bonds* appellate court case because the majority there required disclosures to a party that chose to be unrepresented. *See In re* Marriage of Bonds, 83 Cal. Rptr. 2d 783, 822 (1999) (Ruvolo, J., concurring and dissenting). Judge Ruvolo quoted from the comment to Rule 4.3 of the American Bar Association Model Rules of Professional Conduct which prohibits any advice by a lawyer to an unrepresented party other than informing the party to obtain counsel. *See id.* (Ruvolo, J., concurring and dissenting).

125. *See Bonds*, 5 P.3d at 836.

126. *See id.* at 837 (Sun was a waitress and bartender with aspirations of finishing cosmetology school).

cept of keeping property separate "was a relatively simple concept that did not require great legal sophistication to comprehend and that was, as the trial court found, understood by Sun."[127]

Finally, the court "determined that Barry and Sun were not in a confidential relationship at the time the agreement was executed."[128] The court looked to its language in *Dawley*, stating that "[p]arties who are not yet married are not [presumed] to share a confidential relationship; the record demonstrates that Betty did not rely on the advice and integrity of James in entering into the antenuptial agreement."[129] The court found no indication that the legislature overruled *Dawley*, leaving it as the current law.[130] Since finding a fiduciary duty shifts the burden to the person defending the agreement, the court also found such a holding would violate the express provisions of California's Uniform Act.[131]

4. Ramifications of *Bonds* on Enforceability

The legislative history of the Uniform Act makes clear that the commissioners intended to delineate a set of guiding principles through which state legislatures could develop a consistent body of law regarding the enforceability of prenuptial agreements.[132] Despite the best efforts of the commissioners and the California legislators, legal scholars have continued to criticize how courts have addressed these issues. One scholar reviewed extreme factual situations, similar to *Bonds*, where courts upheld the agreement and stated that "[i]n order to minimize inconsistencies [in court decisions] and promote procedural fairness, courts need to define the elements that comprise equitable negotiations . . . . One way to facilitate this goal is to require each party entering into a prenuptial agreement to consult with independent counsel."[133] Another scholar criticized the court of appeal decision in *Bonds* for creating a strict scrutiny standard without authority, but approved of its requirement of independent counsel. "In light of these problems, the National Conference of Commissioners on Uniform Laws should amend the UPAA to require independent legal counsel for both parties."[134]

127. *Id.*
128. *Id.* at 820.
129. *Id.* at 832 (quoting *In re* Marriage of Dawley, 551 P.2d 323, 331 (Cal. 1976)).
130. *See id.* at 831.
131. *See id.* at 832.
132. *See* UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987).
133. Marston, *supra* note 5 at 913.
134. Shukhman, *supra* note 7, at 490.

The California Supreme Court's decision in *Bonds* falls short of alleviating these concerns. Although the court suggested that the *Bonds* decision was not intended to spell out the duties that an attorney owes to the other party, the court did say that "it is consistent with an attorney's duty to further the interest of his or her client [and] for the attorney to take steps to ensure that the premarital agreement will be enforceable."[135] In describing what leads to enforceable agreements, the court highlighted the factors listed above. These factors were not rigidly separate considerations but rather "the presence of one factor may influence the weight to be given evidence considered primarily under another factor."[136]

In effect, the *Bonds* decision has created a fluid set of factors whose importance will be weighed differently in every circumstance, leaving ample discretion to each reviewing court and failing to define any concrete principles for attorneys to follow. This result cannot simplify court decisions regarding the enforceability of prenuptial agreements, nor can it promote consistent decisions in lower California courts. As demonstrated in *Bonds*, even though there were strong facts depicting what appeared to be coercion under the court's factors, there was also room to dismiss those facts. This allows courts to tailor their decisions independently of any statutory guidelines.

C. The California Supreme Court in *In re Marriage of Pendleton*

1. The Supreme Court's Reasoning and Holding

In re Marriage of Pendleton[137] involved a dispute over the enforceability and scope of a prenuptial agreement between Candace Pendleton and Barry Fireman.[138] Before entering marriage, the parties agreed to waive all future claims for spousal support.[139] After the couple separated, Pendleton challenged the prenuptial agreement, claiming that the provision waiving spousal support was invalid because it was against public policy.[140] The California Supreme Court heard the case to determine whether California's Uniform Act allowed for waivers of spousal support.

135. *Bonds*, 5 P.3d at 833.
136. *Id.* at 838.
137. 5 P.3d 839 (Cal. 2000).
138. *See id.* at 840.
139. *See id.* The agreement was as follows: "Both parties now and forever waive, in the event of a dissolution of the marriage, all rights to any type of spousal support or child support from the other . . . ." *Id.*
140. *See id.*

The premarital agreement between Pendleton and Fireman acknowledged that independent counsel represented both parties and both parties had been advised of the meaning and consequences of the agreement.[141] Both Pendleton and Fireman were independently wealthy. Pendleton had a masters degree and was an aspiring writer with a monthly net income of $4,233.[142] Fireman had a masters and law degree and was a successful businessman.[143] The trial court found that spousal support waivers were against public policy and, due to Pendleton's and Fireman's lavish lifestyle, ordered Fireman to pay $8,500 a month in spousal support.[144] The court of appeal reversed, finding that spousal support waivers were not *per se* unenforceable and the trial court should determine whether this agreement complied with California's Uniform Act.[145] The California Supreme Court affirmed the appellate court's decision.

The California Supreme Court's decision rested heavily on an interpretation of California's Uniform Act. The court noted that as originally adopted, the act allowed for spousal support.[146] Section 1612 of California's Family Code describes what can be contracted for in prenuptial agreements.[147] As originally proposed, this section allowed for the "modification and elimination of spousal support."[148] The California Senate deleted this section shortly before the legislature adopted the Uniform Act.[149]

Despite Candace Pendleton's argument that this deletion by the legislature evinced its intent to forbid waivers of spousal support, the court found that the permissibility of spousal support waivers depends on common law interpretations of prenuptial agreements.[150] The court stated that "we will not presume that the Legislature intended for the law to remain static. It would be unreasonable to assume that the Legislature intended the common law of the 19th Century to govern the marital relationship in the 21st Century."[151] Instead, the Cali-

141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.* at 840–41.
145. *See id.*
146. *See id.* at 842.
147. *See* CAL. FAM. CODE § 1612 (Deering 1999).
148. *Pendleton*, 5 P.3d at 842.
149. *See id.*
150. *See id.* at 845.
151. *Id.* This quote was directed at an earlier reference by the court recognizing that California's Uniform Act essentially codified the common law on prenuptial agreements at the time of its adoption. *See id.*

fornia Supreme Court agreed with the appellate court that the common law rule against spousal support waivers was anachronistic when viewed against current public policy trends.[152]

The court did not decide, nor did it articulate, what factors make a spousal support waiver enforceable. The court greatly confined its holding by refusing to answer "whether circumstances existing at the time of enforcement of a waiver of spousal support is sought might make enforcement unjust."[153] Instead the court stated that public policy was not violated here where a waiver of spousal support was enforced between "intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have advice of counsel . . . ."[154] This suggests that even though a spousal support waiver is not per se unenforceable, there are factual circumstances that may make enforceability unjust. The court does not describe or suggest what these factors might be outside the facts of this case.

2. The Effect of *Pendleton* on Enforceability

After *Pendleton*, it appears there are two additional factors to consider when attempting to draft an enforceable prenuptial agreement that seeks to waive spousal support. First, a drafting attorney must consult the common law at the time parties enter into the agreement to ensure that the tide of support for enforceability has not turned since *Dawley* and *Pendleton*. Second, factual determinations need to be made concerning the fairness of the agreement even though it is not clear which factors are pertinent enough to render enforcement unjust.

The same evils that plague the *Bonds* decision are evident in *Pendleton* as the court has decided to leave determination of enforceability to trial courts with little or no guidance. While the *Bonds* decision was unanimous, Justice Kennard dissented in *Pendleton* and highlighted her concerns about the court's reasoning. Justice Kennard stated that the majority's decision "abdicates [the court's] responsibility to articulate guidelines for the bench and bar explaining when, if ever, such waivers are enforceable."[155] She concluded by emphasizing that "[t]he majority's silence on these important questions does a disservice to the public, the bar, and the bench."[156] Justice Kennard took issue with

152. *See id.*
153. *Id.* at 848.
154. *Id.*
155. *Id.* at 852 (Kennard, J., dissenting).
156. *Id.* at 853 (Kennard, J., dissenting).

the fact that the majority failed to articulate a useable standard.[157] This flaw not only contaminates the *Pendleton* decision, but infects the *Bonds* court's reasoning as well.

III. The Legislature's Response to *Bonds* and *Pendleton*

After the *Bonds* and *Pendleton* decisions were published, the California legislature was quick to clarify the issues addressed by the California Supreme Court.[158] Within five months of the decisions, Senator Sheila Kuehl introduced an amendment to California's Family Code regarding the enforceability of prenuptial agreements.[159] The legislative history of Senate Bill 78 ("S.B. 78") suggests that Senator Kuehl was predominately concerned with the errors the court made in the *Pendleton* case. She stated that "the court fundamentally misinterpreted the Legislature's intent" regarding the appropriateness of spousal support waivers.[160] Regarding *Bonds*, the legislative history indicated that "this measure addresses the *Bonds* decision head on by clarifying in two ways the circumstances which must be present for a court to find that a particular pre-marital agreement was executed voluntarily."[161]

A. Amendments to California's Family Code

Senate Bill 78 met little opposition in the legislature as it passed with almost unanimous support.[162] It was sent to the governor on August 31, 2001.[163] The governor signed the bill into law on September 12, 2001.[164] The changes made by the bill, and the support the bill received demonstrated that the California Supreme Court's reasoning in *Bonds* and *Pendleton* was not well received.

157. *See id.* at 852 (Kennard, J., dissenting).

158. *See* S. 78, 2001–2002, Reg. Sess., Senate Third Reading, at 3 (Cal. 2001).

159. *See* S. 78, 2001–2002, Reg. Sess., Complete Bill History, at 1 (Cal. 2001).

160. *See* S. 78, 2001–2002, Reg. Sess., Senate Floor/Unfinished Business, at 4 (Cal. 2001).

161. *Premarital Agreements: Hearing on S.B. 78 Before Assembly Comm. on Judiciary*, S.B. 78, 2001–2002 Sess., at 9–10 (Cal. 2001) (noting that the two circumstances are: first, that there is a reasonable disclosure of all financial assets; and second, that pre-conditions be met to ensure a voluntary agreement was executed).

162. The bill was passed in the Assembly with 61 Ayes and only 6 Noes. It was passed in the Senate with 39 Ayes and 0 Noes. *See* S. 78, 2001–2002 Reg. Sess., Complete Bill History, at 1 (Ca. 2001).

163. *See* S. 78, 2001–2002 Reg. Sess., Complete Bill History, at 1 (Cal. 2001).

164. Jennifer Warren, *Protections Added to Prenuptual Pacts*, L.A. TIMES, Sept. 13, 2001, at B1.

The bill amends section 1612 of the Family Code which describes the permissible contents of prenuptial agreements. Subsection (c) was added to specifically clarify the issues raised in *Pendleton.* Before the bill was passed, section 1612 did not mention spousal support, now that section states that:

> [a]ny provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed . . . . An otherwise unenforceable provision in a premarital agreement regarding spousal support may not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel.[165]

Although this amendment does not affect the narrow holding in *Pendleton*—that spousal support waivers are not per se void as against public policy—it adds significant protections to a party who benefits from spousal support and also calls into question the viability of the *Bonds* holding that independent counsel was not dispositive in determining enforceability. It is clear from the language of the bill that if spousal support is waived, independent counsel is required.[166] The bill also directly attacks the California Supreme Court's decisions by amending section 1615 of the Family Code pertaining to the enforceability of prenuptial agreements. Unlike section 1612, section 1615 lists the requirements of an enforceable agreement. Subsection (c) was added to directly alter the *Bonds* court's failure to clarify which factors would lead to an enforceable prenuptial agreement. Subsection (c) states:

> [I]t shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record all of the following: (1) The party against whom enforcement was 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 the time the agreement was signed. (3) The party against whom enforcement is sought, if unrepresented by legal counsel, was fully

165. S. 78, 2001–2002, Reg. Sess., Enrolled Bill Text (Cal. 2001).

166. It is interesting to note that in earlier drafts of the bill, Senator Kuehl wanted to directly attack the *Pendleton* decision. The legislative history states that "[t]he author intends with this bill to legislatively confirm that waivers of spousal support in premarital agreements are void as against public policy." S. 78, 2001–2002, Reg. Sess., Senate Floor/ Unfinished Business., at 4 (Cal. 2001).

> 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. (4) The agreement and the writings executed pursuant to paragraphs (1) and (3) were not executed under duress, fraud, or undue influence, and the parties did not lack capacity to enter into the agreement. (5) Any other factors the court deems relevant.[167]

The failure of the *Bonds* decision to articulate a workable standard is most evident in light of the changes made to section 1615. Despite the court's assurance that the legislature did not intend to give more weight to the presence of independent counsel,[168] Senator Kuehl and the legislature have suggested otherwise in S.B. 78.[169] In so doing, the legislature has provided factors that can be used by practitioners and courts in determining whether a prenuptial agreement is enforceable.

B. Remaining Concerns

Justice Kennard, in her *Pendleton* dissent, argued that the court had erred by failing to articulate a clear standard regarding the enforceability of prenuptial agreements.[170] S.B. 78, seemingly in response to Justice Kennard's concerns, "seeks to clarify the circumstances when courts may enforce pre-marital agreements."[171] While the legislature's efforts are a good first step, several issues remain that may create potential problems for practitioners seeking to draft enforceable agreements.

First, section 1615(c)(3) requires that an unrepresented person is fully informed of the terms of the agreement and the basic affect the agreement will have on his or her rights.[172] However, this section does not require that an unrepresented party actually understand the effect of the agreement that they are signing. This raises the question of

167. S. 78, 2001–2002, Reg. Sess., Enrolled Bill Text (Cal. 2001).

168. *See In re* Marriage of Bonds, 5 P.3d 815, 828 (Cal. 2000).

169. *See* S. 78, 2001–2002, Reg. Sess., Enrolled Bill Text, at § 1615(c)(1) (Cal. 2001).

170. *See Pendleton*, 5 P.3d 839, 852–53 (Cal. 2000) (Kennard, J., dissenting).

171. *Premarital Agreements: Hearing on S. 78 Before the Assembly Comm. on Judiciary*, S. 78, 2001–2002, Reg. Sess. (Cal. 2001).

172. *See* S. 78, 2001–2002, Reg. Sess., Enrolled Bill Text, at 1615(c)(3) (Cal. 2001).

what a practitioner must do to carry his or her burden of disclosure to the unrepresented party. Will a blanket statement about community property law suffice,[173] or does the attorney need to ensure that the unrepresented party actually understands the issues? The latter would require a full disclosure of the effects of the agreement. Critics of S.B. 78 have expressed concern that this disclosure will "likely mean that any oversight (in providing full disclosure), no matter how slight, might be grounds for a set aside . . . ."[174]

Second, requiring an attorney to make disclosures to an unrepresented party raises the possibility of dual representation.[175] Appellate courts have found that such violations of the Professional Rules of Conduct could result in disqualification,[176] damages against the attorney,[177] or possibly the voiding of the agreement.[178] Rule 3-310(C)(1) prohibits representation of more than one client in which the client's interests conflict.[179] S.B. 78 creates a situation in which an attorney may be undertaking the defense of more than one party with adverse interests through the disclosures that the bill requires. The bill makes no mention of this problem.

Third, in addition to creating potential conflicts of dual representation, requiring an attorney to give advice to unrepresented parties may violate other ethical rules of conduct. Judge Ruvolo dissented in the *Bonds* appellate decision and cautioned that the comment to Rule

173. *See Bonds*, 5 P.3d at 836 (finding that the agreement was voluntary, in part, because basic community law principles had been explained to Mrs. Bonds prior to the signing to the agreement).

174. *Premarital Agreements: Hearing on S. 78 Before the Assembly Comm. on Judiciary*, S.B. 78, 2001–2002 Sess. at 10–11 (Cal. 2001) (statement in opposition by The Family Law Section of the Los Angeles County Bar Association).

175. This was also a problem in the suggestions made by the court in *Bonds*—it suggested that the basic tenets of community property law should be disclosed to an unrepresented party. *See Bonds*, 5 P.3d at 835–36. *See also* Cal. R. Ct. Code Ann. R.P.C. 3-310, Discussion § 7 (West 2001) (explaining that dual representation in the preparation of antinuptial agreements was an example of a situation in which Rule 3-310(C)(1)–(2) would apply).

176. *See* Woods v. Superior Court, 197 Cal. Rptr. 185, 189 (1983) (finding that a violation of professional rules of conduct that prohibit representing conflicting interests results in disqualification of the attorney).

177. *See* Klemm v. Superior Court, 142 Cal. Rptr. 2d 509, 514 (1977) (warning that failing to disclose a potential conflict between clients of an attorney could result in civil liability against the attorney).

178. *See id.* at 509 (stating that the validity of an agreement without independent counsel is vulnerable to easy attack). *See also In re* Marriage of Egedi, 105 Cal. Rptr. 2d 518, 523 (2001) (finding that when an attorney is acting only as the scrivner to an agreement he need not inform the parties of the pros and cons of his alleged dual representation).

179. *See* Cal. R. Ct. Code Ann. R.P.C. 3-310(C)(1) (West 2001).

4.3 of the American Bar Association Model Rules of Professional Conduct prohibited an attorney from giving *any* advice to an unrepresented party.[180] Judge Ruvolo recognized that California's Rules of Professional Conduct had not yet adopted a similar provision.[181] However, "in the absence of a rule of professional responsibility conflicting with or dealing with the same subject matter, California courts may look to the ABA Model Code for guidance or support for conduct."[182] There is a colorable argument that S.B. 78 encourages ethical violations because it requires a drafting attorney to make certain disclosures to unrepresented parties.[183]

Finally, even though the legislature has provided some guidelines for determining whether an agreement is enforceable, it has failed to eliminate the ambiguity that flows from leaving unbounded discretion with the courts.[184] Section 1615(c)(5) gives courts discretion to weigh any other factors that they deem relevant, in effect creating a "catch all" provision.[185] Such a blanket provision allows courts to fall back on the same case-by-case analysis which Justice Kennard objected to in *Pendleton*.[186] Additionally, there are no guidelines for how subsection (5) will be weighed compared to the other subsections. It is possible, under the current language, for an agreement to be struck down even though subsections (1) through (4) are complied with because a court finds "other" factors to be particularly relevant.

For example, if an unrepresented party's natural language was not English, as in the *Bonds* case, or if the unrepresented party had a history of emotional instability, a court could utilize subsection (5). Presumably, a court could make an enforceability determination

180. *See In re* Marriage of Bonds, 83 Cal. Rptr. 2d 783, 822 (Cal. 1999) (Ruvolo, J., concurring and dissenting).

181. *See id.*

182. *Id.* at 822 n.11. *See also* Santa Clara County Counsel Att'ys Ass'n. v. Woodside, 28 Cal. Rptr. 2d 617 n.7 (Cal. 1994).

183. Senator Kuehl has been quoted as saying that S.B. 78, as adopted by the California legislature, "protects the spouses who are called upon, just before a wedding, to waive all their future rights . . . . It still allows them to do that, but I think these protections give them a better chance to know what they're waiving." Jennifer Warren, *Protections Added to Prenuptial Pacts*, L.A. TIMES, Sept. 13, 2001, at B1.

184. Without a clear set of guidelines, it is impossible to predict how varying lower courts will handle enforceability issues. Justice Kennard dissented in *Pendleton* and chastised the court for failing to articulate a standard that the bench and bar could follow. *See Pendleton*, 5 P.3d 839, 852–53 (Cal. 2000) (Kennard, J., dissenting).

185. *See* S. 78, 2001–2002, Reg. Sess., Enrolled Bill Text (Cal. 2001). *See also Premarital Agreements: Hearing on S. 78 Before the Assem. Comm. on Judiciary*, 2001–2002, Reg. Sess., at 11 (Cal. 2001) (stating that subsection (5) was a "catch all" section).

186. *See Pendleton*, 5 P.3d at 852–53 (Kennard, J., dissenting).

based on an unrepresented party's intelligence, or lack thereof. While this may seem equitable in some cases, there is absolutely no way for a drafting attorney to take every factual nuance into account in an effort to create an enforceable agreement.[187] Without specific guidelines, there is no limit to the factors a court might find compelling. Opposition to the bill highlighted this concern by stating that the "catch-all" factor "will alone leave every premarital agreement vulnerable to being set aside."[188] Enforceability decisions must be grounded in a more structured set of rules than the whims of trial judges across the state.

IV. Solution

The California Supreme Court, through its *Bonds* and *Pendleton* decisions, addressed several issues regarding the enforcement of prenuptial agreements. The problem is that the court detailed a myriad of factors that should be considered without clearly defining how, and in what situations, each factor will be weighted. The legislature quickly responded and attempted to clarify the issues raised by *Bonds* and *Pendleton.* A close reading of the new legislation reveals that many of the concerns created by the court's rulings have yet to be resolved. Issues of dual representation and unbounded discretion in the courts continue to create ambiguity for practitioners seeking to create enforceable agreements.

A. Continued Legislative or Judicial Reform

There can be little doubt in light of the recent efforts by the legislature that deficiencies exist regarding issues of enforceability of prenuptial agreements. The steps taken by the legislature to this point are effective and have improved the state of the law from its position immediately after *Bonds* and *Pendleton.* However, other issues remain unresolved. The legislature and the California Supreme Court are in the best position to effectuate change.[189] The changes should mirror the

187. "One family law attorney said the law lacks specificity, and predicted it would lead to more litigation." Jennifer Warren, *Protections Added to Prenuptial Pacts,* L.A. TIMES, Sept. 13, 2001, at B1.

188. *Premarital Agreements: Hearing on S. 78 Before the Assembly Comm. on Judiciary,* 2001–2002, Reg. Sess., at 11 (Cal. 2001) (statement of opposition by The Family Law Section of the Los Angeles County Bar Association).

189. *See generally* Charlotte K. Goldberg, *If It Ain't Broke Don't Fix It: Premarital Agreements and Spousal Support Waivers in California,* 33 LOY. L.A. L. REV. 1245, 1247 (2000) (arguing that only the California legislature can effectively set the proper policy criteria for determining the enforceability of premarital agreements).

goals of S.B. 78[190] with special attention given to the problems highlighted herein.

Initially, the ambiguity of the amendment to section 1615 could be clarified by legislative amendment. Section 1615(c)(3) should be amended to describe exactly how much disclosure is required to dutifully apprise an unrepresented party of his or her rights and how those rights are affected by the agreement. Clarity on this issue would allow an attorney to efficiently ensure that the unrepresented party was duly informed, eliminating future lawsuits challenging the efficacy of the disclosure.

The legislature must also create a standard document that could be given to an unrepresented party advising them of their community property rights and explaining that such rights would be affected by signing the agreement.[191] This would resolve ambiguities in the statute and remove the burden of disclosure from the attorney, insulating him or her from claims of dual representation or other ethical violations.

In addition to resolving ambiguities in the language of the statute, the legislature should amend section 1615(c)(5) to prevent lower courts from making enforceability decisions without an articulable standard. The legislative history is devoid of information on the purpose or necessity of this subsection. Subsection (c)(5) does more harm than good by preventing section 1615 from detailing a clear standard for enforceability. The legislature should simply delete subsection (5). Alternatively, the legislature could define some of the areas in which subsection (5) factors arise, thus providing some guidance for lower courts and practitioners. For example, the legislature could suggest that other relevant factors may relate to the intelligence or emotional stability of the parties. Although the latter option does not completely solve the problem, it gives drafting practitioners more guidance to ensure that the agreement was voluntarily signed.

The California Supreme Court has examined the area of marital dissolution law several times over its history. It has even demonstrated a willingness to correct mistakes made in earlier decisions. Only three years after its decision in *In re Marriage of Higgason*, the court granted

190. *See* S. 78, 2001–2002, Reg. Sess., S. Floor Report, at 1 (Cal. 2001).

191. In an effort to inform individuals who do not have legal counsel of the responsibilities of using a durable power of attorney, the California legislature drafted a notice to be given to such individuals informing them of applicable laws and duties. *See generally* CAL. PROB. CODE § 4128 (Lexis Supp. 2001). A similar type of notice could be used to inform unrepresented parties of their community property rights and how those rights could be affected by a prenuptial agreement.

review in the *Dawley* case to clarify some of the ambiguities it had created.[192] The current state of the law presents another opportunity for the court to more clearly articulate a workable standard.

The court, in conjunction with the California State Bar, could immediately address the problems of dual representation that are raised by the new legislation. Rule of Professional Conduct 1-100 states that the rules "have been adopted by the Board of Governors of the California State Bar and approved by the California Supreme Court pursuant to Business and Professions Code sections 6076 and 6077 to protect the public and promote respect and confidence in the legal profession."[193] The Board of Governors could submit an initiative to change Rule of Professional Conduct 3-310 to allow disclosures by attorneys to unrepresented parties without a threat of creating dual representation.[194] This would prevent an attorney from representing adverse interests and would give attorneys flexibility in ensuring that unrepresented parties not only know their rights, but understand them as well.

B. Practitioner's Guide to Enforceable Prenuptial Agreements

If the legislature and the court fail to clarify the issues raised in this area of law, then practitioners are left to their own devices to determine the most effective way to ensure an enforceable prenuptial agreement. The best way to accomplish this feat is to pay specific heed to both the factors laid out by *Bonds* and *Pendleton*, as well as the factors highlighted by the legislative amendments. Clearly, obtaining independent counsel is the single most important step to ensuring enforceability.[195] The Continuing Education Bar, Estate Planning and California Probate Reporter briefed the *Bonds* and *Pendleton* decisions and agreed that "it will be easier to obtain enforcement of a premarital agreement if both parties are represented by independent coun-

192. *See In re* Marriage of Dawley, 551 P.2d 323, 328 (Cal. 1976).

193. Cal. R. Ct. Code. Ann. R.P.C. 1-100 (West 2001); *see also* CAL. BUS. & PROF. CODE § 6076 (West 2001) (stating that "[w]ith the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar in the State").

194. *See* CAL. BUS. & PROF. CODE § 6076.5 (West 2001) (describing the formal procedures that the State Bar must take to formulate an initiative that would change the Rules of Professional Conduct).

195. *See In re* Marriage of Bonds, 5 P.3d 815, 829 (Cal. 2000); S. 78, 2001–2002, Reg. Sess., Enrolled Bill Text § 1615(c)(1) (Cal. 2001).

sel."[196] However, further actions must be taken to ensure that an agreement cannot be successfully challenged.

First, enforceability determinations will depend on a factual analysis. Therefore it is necessary that an attorney develop a sound factual record. This can be accomplished by videotaping signing conferences and other meetings between the parties, or hiring a court reporter to document the events to show that the agreement was entered into voluntarily. Also, in keeping with section 1615(c)(3) requirements, an attorney must memorialize conversations with unrepresented parties so that a factual record is established.

Second, if one party decides that independent counsel is not needed, the burden is on the attorney for the represented party to ensure that a conflict of interest does not arise. Section 1615(c)(3) requires some form of disclosure to the unrepresented party. The scope of this disclosure is unclear in the current language of the statute and the *Bonds* decision.[197] It is possible that any legal advice could create a dual representation situation that would carry adverse effects for the represented party.[198] Therefore, the attorney should inform the unrepresented party that he has a duty of loyalty to his client and his client alone and that he does not represent any other parties to the agreement.[199] The attorney should obtain an "informed written consent"[200] from both parties which requires disclosing the adverse consequences of such representation if a court were to determine that dual representation occurred.[201] This consent will prevent an attorney from being liable to either client for representing clients with conflicting interests.[202]

Conclusion

Both the commissioners who drafted the Uniform Act and the California legislators who put it into effect recognized confusion in the common law regarding premarital agreements. The Uniform Act

196. CEB, 22 EST. PLAN. & CAL. PROB. REP. 61, 63 (Oct. 2000).

197. *See Bonds*, 5 P.3d at 835–36 (finding that describing basic community property principles was sufficient to make the unrepresented party aware of her rights).

198. *See* Cal. R. Ct. Code Ann. R.P.C. 3-310, Discussion (West 2001) (stating that dual representation occurs in the drafting of antenuptial agreements).

199. *See Bonds*, 5 P.3d at 833.

200. *See* Cal. R. Ct. Code Ann. R.P.C. 3-310(A)(2) (West 2001) (defining "informed written consent"). *See also* Cal. R. Ct. Code Ann. R.P.C. 3-310(C)(1) (West 2001) (stating that such consent is required if adverse interests are represented by the same attorney).

201. *See* Cal. R. Ct. Code Ann. R.P.C. 3-310(A)(1)–(2), & (C)(1).

202. *See id.*

and state laws clarified a number of issues regarding the legal effect of these documents. However, in certain areas such as the enforceability of prenuptial agreements, the courts have struggled to define clear principles that can be used to ensure this enforceability. The California Supreme Court's efforts in this area, manifested through the *Bonds* and *Pendleton* decisions, attempt to square a century of common law principles with those described in the Uniform Act. Unfortunately, a continued reliance on the common law combined with a new fact-based analysis has proved to be problematic. The legislature has attempted to cure some of the ambiguities created by the California Supreme Court's decisions. While the attempt was valiant, the same deficiencies that plagued *Bonds* and *Pendleton* seeped into the legislative amendments.

Who will step up to the plate next? The legislature or the court can remedy any lingering issues in this area by limiting the discretion given to lower courts and outlining factors that practitioners can rely on to draft enforceable agreements. Outside of these adjustments, practitioners are left with but one weapon: diligence. By being mindful of dual representation traps, obtaining proper consent from the parties, and following the legislature's guidelines, many concerns can be alleviated. Until reliable factors are clearly articulated, practitioners and courts will have to guess what is important in determining the enforceability of premarital agreements. The practitioner who exercises the most care utilizing these suggestions will likely be best prepared to defend his or her agreements.