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The Practitioner Family Law

French Knots

'Contrat de Mariage' in California

By Peter M. Walzer and Catherine Parker

In 1660, Louis XIV married his first cousin, the Spanish Princess Marie-Thérèse. The premarital agreement, known as the *Traité des Pyrénées*, put an end to the ongoing war between France and Spain. Under the agreement, in exchange for a cessation of hostilities, Spain gave France important territories and a bride for Louis XIV with a dowry of 500,000 gold *écus*. Yet despite a long and venerable history, there is no guarantee that French premarital agreements will be enforced in California.

California law regarding premarital agreements (also known as prenuptial and antenuptial agreements) differs from French law in many ways. In France, future spouses who wish to enter into a premarital agreement (*contrat de mariage*) must appear together before a *notaire* prior to the wedding and select one of the *régimes matrimoniaux* offered by the French Civil Code.

California law does not provide 'ready-made' frameworks for premarital agreements similar to the French *régimes*.

A *notaire* is a legal professional specializing in wills, real estate transactions, premarital agreements and generally all documents or deeds that require authentication of the consent and signature of the parties. The *notaire* also advises future spouses as to the legal consequences of their choice of *régime*.

The parties have an option between several versions of the community property and other *régimes*, including *séparation de biens* (separate property). Those statutory *régimes* may, within certain public policy limits, be modified by future spouses to accommodate their specific needs. Of course, spouses may choose not to enter into a premarital agreement and the default *régime* of *communauté légale* (one of the forms of French community property) will then govern their legal relationship.

If a couple marries in California without a premarital agreement, California community property law applies. This is similar to the French default *régime*. Under California law, future spouses may also modify their legal relationship by entering into a premarital agreement drafted by their attorneys. California law does not provide "ready-made" frameworks for premarital agreements similar to the French *régimes*. Future spouses (and their attorneys) have more leeway to define their future legal relationship than is usual in France, although they are bound by public policy considerations in drafting the agreements.

In spite of the foregoing differences, the practical consequences of premarital agreements in France and California may be very similar. For instance, both spouses may wish to provide in their California premarital agreement that their earnings during the marriage will remain separate, which could likewise be achieved through the *régime* of *séparation de biens* under French law. However, because the legal requirements of a French premarital agreement are different from those of a California agreement, a French *contrat de mariage* may be open to attack before California courts.

Under California law, a premarital agreement may be set aside if it was unconscionable or procured by duress. Courts tend to suspect that the agreement is unconscionable if it is unbalanced and confers an advantage upon one spouse to the other's detriment. Under French law, duress would also, in theory, negate the parties' consent and void their premarital agreement. However, in practice, the involvement of a *notaire* seems to provide an effective guarantee of fair play and avoid the need for litigation.

Moreover, under California law, an agreement may be set aside if one spouse failed to disclose to the other, at the time of execution, his or her assets or liabilities, or their value, unless the parties waived disclosure. (French law does not require any disclosure.) Although under California law future spouses may waive disclosure of their assets and obligations, this waiver could weaken an otherwise solid agreement.

A California premarital agreement must be tailored to the particular needs of the spouses and sufficiently flexible to take into account changes in their future circumstances during the course of the marriage (for instance, the birth of children, the increase or decrease in the value of their assets, the sale or purchase of a business, career changes or the long-term disability of one spouse). In case of major unforeseen changes, it may be advisable to update a premarital agreement that may have become obsolete.

Under French law, the spouses may modify their premarital agreement, or change *régimes* altogether, subject to court approval. The old *régime* must have been in force for two years and the change must be in the family's best interests.

Under California law, a premarital agreement may be set aside if it promotes dissolution. For instance, a promise of substantial payments upon divorce may be interpreted as an encouragement to dissolution and invalidate the entire agreement, or at least that particular provision.

A waiver of spousal support or attorneys' fees would be likewise contrary to California public policy and might jeopardize, in whole or in part, the agreement. (However, in some other states, a limitation of support in a premarital agreement would be enforceable.) There are no such provisions in French premarital agreements because spouses may not determine the amount of support by way of an agreement prior to the commencement of a divorce action. In California, as in France, provisions relating to child custody and child support are not subject to premarital agreements.

In California, each future spouse should be represented by independent counsel, which differs from the single *notaire* system under French law. If the agreement is drafted by one of the attorneys, counsel representing the other spouse must be provided sufficient time to analyze and negotiate the terms of the proposed agreement before the celebration of the marriage. Agreements executed "under the gun" on the eve of marriage tend to be suspect in California.

Finally, both spouses must remember that they will have to live up to the terms of the agreement after its execution. In California, a premarital agreement may be set aside if the parties fail to follow its terms during the course of the marriage.

For French nationals residing or owning property in California, conflict-of-law issues may arise. If the spouses entered into a premarital agreement in France only, California courts will analyze the its substance and form to determine whether it is contrary to California public policy. For instance, the spouse seeking to set aside the French *contrat de mariage* might attempt to do so by claiming that he or she had not retained separate counsel prior to entering into the premarital agreement, that the other spouse had not disclosed his or her assets without waiver of the disclosure or that the agreement's execution had been made under duress. These claims may or may not be sufficient to set aside the agreement.

Likewise, the United States no uniform legislation governing premarital agreements. Laws vary substantially from state to state, even among various community property states. The Uniform Premarital Agreement Act (codified in California at Family Code Section 1600 et seq.) is a misnomer. If spouses move to California and later seek a divorce, it is doubtful that California courts would uphold an out-of-state agreement contrary to California public policy, just as they might not honor a French premarital agreement.

There is no California case directly dealing with the issue of enforceability of French premarital agreements. However, in a case where spouses had been married in Mexico and subsequently moved to California, a California Court of Appeal upheld the validity of their Mexican premarital agreement. *Fernandez v. Fernandez*, 194 Cal.App.2d 782 (1961).

Pursuant to Mexican law, the spouses, as in France, had a choice of several regimes and had elected before the clerk of the Office of Civil Registry, whose functions with regard to the agreement seem similar to those of a French *notaire*, to enter into a separate property agreement.

French premarital agreements, because of similarities with their Mexican counterparts, should be valid and enforceable in California. However, because of public policy issues, litigation is likely when substantial assets are at stake.

To avoid this kind of dispute, it would be prudent, after French spouses become California residents, to draft a new agreement complying with California law to ensure that the provisions of the initial *contrat de mariage* will be upheld by California courts.

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