CALIFORNIA Family Law Monthly

In re Marriage of Hill and Dittmer

Bookmark this case under "*Prenuptial Agreements–Form File.*" Why that designation? Because, after rejecting a challenge to the Pre-Nup between two "enormously successful" people, even though signed on the day of the wedding, the Appellate Court set forth in the Appendix a copy of relevant provisions of the well-drafted Agreement upon which the court relied to uphold its enforceability. What are often casually overlooked as boilerplate recitals or provisions can be used, as they were here, to defeat a challenge to prove that the challenging party signed the agreement voluntarily and had sufficient opportunity and access to the other party's financial information. Keep in mind that the *Hill-Dittmer* Prenuptial Agreement was prepared and signed in 2001...case law interpretation has evolved in the eleven years since, and would suggest inclusion of additional provisions re disclosures and fairness concerns. An excellent review with practical practice pointers for drafting Prenuptial Agreements can be found in the November 2011 issue of Los Angeles Lawyer, entitled "Prenuptial Practice."

Not at issue in *Hill and Dittmer*, and thus not discussed in the opinion, is the relatively new attempt to cloak preparation, negotiation and disclosures (or the lack thereof) incident to Prenuptial (and Postnuptial) agreements with mediation confidentiality. This is usually orchestrated by the party with more substantial wealth. While mediation is a favored process, in this context it contains hidden dangers. Case law, although subject to heated debate, holds that mediated agreements are not entitled to the presumption of undue influence, and that any and all communications or disclosures incident to mediated agreement may not be admissible evidence because they are protected by mediation confidentiality. Thus, arguably, even an egregious breach of fiduciary duty incident to a mediated Prenuptial Agreement may not constitute grounds to set aside and invalidate the agreement because evidence of the breach is inadmissible due to mediation confidentiality. See, *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56.

This case also held that the provisions of *Family Code* Section 1615 (enacted in 2002) did not apply retroactively so as to impact the 2001 agreement. In rejecting wife's challenge to the agreement, the court relied on explicit provisions of the agreement wherein the wife waived the provisions of Section 1615 relating to financial disclosures, and acknowledged that she had sufficient opportunity to access information about his finances. Two other practice reminders are worthy of note, one discussed in the *Hill-Dittmer* opinion, one not. The Justices directly state that wife was aware of the operative provisions from the *various drafts* of the agreement that were negotiated, revised and exchanged prior to the final document. So, in this computer age, preserve all drafts, revisions, correspondence, emails, etc. which constitute a contemporaneous record of what transpired. And don't forget, although not cited in this opinion, *Evidence Code* Section 622, which provides that the facts recited in a written instrument are conclusively presumed to be true as between the parties. Be careful of the Recitals. Finally, bookmark this case for your next Prenup!

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