

Ansin v. Craven-Ansin (2010) 929 N.E.2d 955

It is commonplace for states across the country to look to California for cutting edge political issues and innovative judicial decisions. Once in a while, it is our turn to look to a sister state for some perspective. Here we look to a decision of the Supreme Court of Massachusetts for its first impression interpretation of the enforceability of a post-nuptial agreement. Even after the *Burkle* Court upheld a bitterly contested post-marital agreement [2006 Cal.Fam.Law 175-183 (July 2006)], California law continues to be less than clear regarding enforcement of these increasingly prevalent agreements.

The Massachusetts court upheld the validity of the parties' postnuptial agreement entered into after 19 years of their 21 year marriage. The Supreme Court held that the validity of a marital agreement depends upon a judge's careful scrutiny, at a minimum, as to whether the following factors exist:

- “(1) each party has had an opportunity to obtain separate legal counsel of each party's own choosing;
- (2) there was fraud or coercion in obtaining the agreement;
- (3) all assets were fully disclosed by both parties before the agreement was executed;
- (4) each spouse knowingly and explicitly agreed in writing to waive the right to judicial equitable division of assets and all marital rights in the event of a divorce; and
- (5) the terms of the agreement are fair and reasonable **at the time of execution and at the time of divorce.**”

A major difference exists re the burden of proof. In the Massachusetts case, the court held that the spouse seeking to uphold the agreement bears the burden of proof in satisfying the above criteria. In California, it is the party challenging the agreement who bears that burden. The Court acknowledged that pre-marital and marital agreements have different standards. The Court reasoned that marital agreements must be carefully scrutinized and opined that the scrutiny is greater than that of pre-marital agreements since, in part, because one party can use the threat of dissolution “to bargain themselves into positions of advantage” and there may exist less freedom to reject the contract.

The Court outlined the variables to be evaluated in determining whether a marital agreement was fair and reasonable at the time of execution. The factors considered at the time of execution are as follows: (1) entire context in which the agreement was reached, allowing greater latitude for agreements reached with separate counsel of each party's own choosing; (2) magnitude of disparity between the outcome under the agreement and the outcome under other prevailing legal principles; (3) whether the purpose of the agreement was to benefit or protect third party interests (i.e. children from prior relationship); (4) the impact of the agreement's enforcement upon the parties' children; (5) length of marriage; (6) motives of contracting parties; (7) respective bargaining positions; (8) circumstances giving rise to the agreement; (9) degree of

pressure experienced by the contesting spouse; and (10) other factors the judge considers relevant.

The Massachusetts court also looked at the agreement at the time of divorce. The factors considered at the time of the divorce that a judge may consider are as follows: “(1) the nature and substance of the objecting party’s complaint; (2) the financial and property division provisions as a whole; (3) the context in which the negotiations took place; (4) the complexity of the issues involved; (5) the background and knowledge of the parties; (6) the experience and ability of counsel; (7) the need for and availability of experts to assist the parties and counsel; (8) the mandatory and, if the judge deems appropriate, the “discretionary factors” which include mandatory factors of the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income, and the present and future needs of dependent children of the marriage. Discretionary factors include the contribution of each party to the acquisition, preservation or appreciation in value of their respective estates and the contribution of each party as homemaker to the family unit. The *Ansin* Court found that the marital agreement was fair and reasonable at the time of execution and at the time of the divorce.

The factors that the *Ansin* Court considered included both looking at the agreement at the time it was executed and *at the time of enforcement*. The time of enforcement has not been accepted in California as a factor in determining the validity of marital agreements, but was raised and considered in a depublished opinion regarding a premarital agreement waiver of spousal support. (*In re Marriage of Rosendale* (2004) 119 Cal.App.4th 1202.) Since the general policy of the law is to allow marital partners to enter into agreements so long as their fiduciary obligations are satisfied, the effect of looking at the fairness at the time of enforcement [not now the law in California] would make these agreements more susceptible to unexpected adverse factual circumstances, as was the case in the depublished *Rosendale* opinion.

Be aware of and very careful of Recitals in marital agreements. They carry weight in determining whether the agreement was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of the effect of the transaction. (*See In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56.) It is a question of fact whether an agreement will be upheld if it states that the party "has read and fully understands " the agreement. (*See In re Marriage of Lund* (2009) 174 Cal.App.4th 40, 56.) *Evidence Code* section 622 provides: "Facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration."

Although not an issue in the *Ansin* case, marital agreements are often negotiated during mediation. That context adds another aspect to challenge the agreement’s enforceability, since *Evidence Code* sections 1115 *et seq.* establish that mediation communications are subject to mediation confidentiality; these statutes are broadly interpreted and strictly enforced. Mediation communications are protected and cannot be introduced into evidence unless there is a written waiver by both parties and the mediator. Only the *Kieturakis* case [which itself is subject to differing interpretations] [2006 Cal.Fam.Law 117-124 (May 2006)] has so far addressed the extent to which a party’s claimed inability to defend against a challenge to a post-nuptial agreement because mediation confidentiality prevents presentation of evidence to rebut the challenge. Whether a breach of a spouse’s fiduciary duty incident to the signing of a post-marital

agreement trumps a claim of mediation confidentiality is the subject of continuing debate and litigation.

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