Antenuptial Agreements and California Law: Building Confidence

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With the rising rate of divorce in American society, antenuptial agreements have grown increasingly popular. In California, prospective spouses find antenuptial agreements particularly useful to avoid community property divisions in the event of divorce. The majority of jurisdictions impose a fiduciary relationship on parties entering into antenuptial agreements. California law, however, has traditionally failed to recognize the close and trusting nature of the parties' relationship, and instead has treated prospective spouses as arm's-length adversaries. This Comment argues that the California legislature should adopt the majority view, and treat prospective spouses in a way reflective of reality, public policy, and intimations of the California Supreme Court.

INTRODUCTION

In 1849 a system of community property was officially instituted in California. Underlying community property law is the policy that a husband and wife are partners, with equal ownership and managerial rights in virtually all property acquired during marriage. The goal of their partnership is a successful marriage; each spouse contributes equally to that goal. In light of this partnership concept,
California disregards any difference in the couple’s separate incomes, and community property is divided into two equal shares if divorce occurs.

A couple may, however, remove themselves from California’s community property system by contract, either before or after the marriage ceremony. California Civil Code section 5103 places a married couple who contract with one another respecting property into a “confidential relationship.” Thus, each spouse is held to a high standard of fair dealing and full disclosure in transactions with each other. When the couple transmutes community property into separate property, each spouse must advise the other of his or her assets and of any property rights being given up by the other partner. If these requirements are not met, breach of the confidential relationship will be presumed when the transmutation is challenged. If this presumption is not rebutted by contrary proof, all or part of the contract will be unenforceable.

In contrast, an engaged couple contracting with each other prior to the marriage ceremony to avoid the community property system, or to otherwise define their marital property rights, is not given the protection of the “confidential relationship” presumption of section 5103.

community of interest. With the feeling in mind that during marriage the time and attention of husband and wife should be directed toward furthering the goals — economic, moral, social — of the marriage, the community was organized as the most suitable vehicle for accomplishing these goals. Id. at 34.

4. Id. at 55.
5. CAL. CIV. CODE § 4800 (West 1985).
7. (a) Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried. (b) Except as provided in Sections 143, 144, and 146 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with Section 2215) of Part 4 of Division 3.

9. See CAL. CIV. CODE § 2228 (West 1985); Wenke & O’Hare, Antenuptial Agreements: Litigating Their Validity Upon Dissolution of Marriage, 6 ORANGE COUNTY B.J. 216, 228-29 (1979).
10. “‘Transmutation’ is a generic term that describes . . . contractual and donative transactions between [husband] and [wife] changing the character of property from separate to community or vice versa.” W. REPPY, COMMUNITY PROPERTY IN CALIFORNIA 29 (1980).
13. See infra notes 52-53 and accompanying text. See also Wenke & O’Hare, supra note 9, at 219.
California, unlike the majority of jurisdictions, considers a betrothed couple to be dealing at arm's length. Thus, when an antenuptial agreement is challenged for fraud, misrepresentation, or other formation defects, the parties are not held to the same high standards of fairness attending postnuptial property contracts.

In 1977, however, the California Supreme Court suggested in a footnote in *Marvin v. Marvin* that in certain instances a confidential relationship may arise between an unmarried couple; thus, they would be subject to the fiduciary duties of fair dealing and full disclosure when contracting with one another. This Comment will examine the validity of California's "arm's-length" analysis of antenuptial agreements, in light of *Marvin's* implied extension of the "confidential relationship" presumption.

Further, this Comment will compare the majority and California views, focusing on protection of the parties and their ability to fulfill contractual expectations. The prospective spouses' relationship, public policy, and the *Marvin* trend are advanced as factors in support of abandoning the California view. The need for clear guidelines in negotiating and drafting antenuptial agreements and the importance of contractual certainty are also offered in support of this position.

Ultimately, this Comment argues that the California legislature should take action in this uncertain legal area before it is completely overridden by the judiciary. It is therefore proposed that Civil Code section 5103 be amended to protect not only spouses but also prospective spouses who contract with each other regarding marital property.

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19. 18 Cal. 3d at 682 n.22, 557 P.2d at 121 n.22, 134 Cal. Rptr. at 830 n.22.
ANTENUPTIAL AGREEMENTS: CHANGING TIMES

As divorce rates rise, antenuptial agreements grow increasingly popular. The frequent use of antenuptial agreements reflects the realization that marriage is not necessarily "til death do us part" and the desire to minimize financial risks when marrying. Because California is a community property state, all real or personal property acquired by either spouse during marriage will be subject to division in equal shares should dissolution of the marriage occur. Antenuptial agreements often enable the parties to a marriage to retain their individual earnings and property acquired during the marriage as separate property at dissolution.

Antenuptial agreements serve two major purposes: (1) to order the prospective spouses' property, earnings, and expenses in a way that prevents later claims; and (2) to articulate their expectations as to interpersonal relationships and the means of carrying out those expectations. Thus, antenuptial agreements are "as much a matter of contract law as they are a creature of family law."

The legality of antenuptial agreements has long been recognized in California: "Parties contemplating marriage may validly contract as to their property rights, both as to property then owned by them and as to property, including earnings, which may be acquired by them after marriage." Prenuptial contracts are favored by public policy, as long as their terms do not encourage or promote divorce.

26. There are three statutory exceptions to the community property classification. Property acquired while living separate and apart from one another, property acquired by one spouse by gift, bequest, devise, or descent, and any rents, issues, and profits from separate property are deemed separate property. Additionally, property acquired before marriage or after dissolution is separate property. See Cal. Civ. Code §§ 5107, 5108, 5110, 5118 (West 1985). Moreover, the couple must be domiciled in California for California's community property classification to apply. Cal. Civ. Code § 5110 (West 1985).
27. The term "dissolution," as used in this Comment, includes both divorce and death as ways in which a marriage might end.
30. 1 C. Markey, California Family Law Practice and Procedure § 125(3) (7th ed. Supp. 1984). See also Branca & Steinberg, supra note 15, at 318 ("Indeed, it is the very purpose of antenuptial agreements to exclude the operation of the usual property rules.").
31. Wenke & O'Hare, supra note 9, at 217.
33. The terms antenuptial agreement, prenuptial contract, and premarital contract will be used interchangeably throughout this Comment.
For example, the agreement may not contain provisions limiting or waiving spousal support obligations imposed by law. The formal requirements for antenuptial agreements are that they be in writing and that they be acknowledged by each party. Further, if any real property is affected by the contract, recordation is required.

Typically, cases in which the validity of antenuptial agreements is disputed involve older parties, previously divorced or widowed, at least one of whom has children. Having been married before, the parties more readily recognize the possibility and potential consequences of an end to their marriage. Thus, contractual provisions respecting property are made to benefit children from previous marriages by preventing a new spouse's claim, or to avoid community property divisions should divorce occur.

Frequently, the wife challenges the antenuptial agreement when the marriage ends, claiming that the more legally and financially astute husband used undue influence to obtain her consent to the agreement. Other typical claims are that the husband did not disclose the true value of his assets, or that the wife waived valuable property rights—perhaps inheritance or probate homestead rights—unknowingly. As will be discussed, the difference in freely and intelligently made is generally regarded as conducive to marital tranquility and the avoidance of disputes about property in the future.” Friedlander v. Friedlander, 80 Wash. 2d 293, 298, 494 P.2d 213 (1972). 35. 17 Cal. 3d 342 at 351, 351 P.2d at 328, 131 Cal. Rptr. at 8; 139 Cal. App. 2d at 211-12, 293 P.2d at 90. 36. CAL. CIV. CODE § 5134 (West 1985). 37. CAL. CIV. CODE § 5135 (West 1985). However, in the absence of recordation, the agreement will still be enforceable between the parties. CAL. CIV. CODE § 1217 (West 1985). Thus, the recordation requirement is of importance only to third parties. 38. Haskell, The Premarital Estate Contract and Social Policy, 57 N.C.L. REV. 415, 436-37 (1979). See Moore, supra note 24, at 11; Clark, Antenuptial Contracts, 50 U. COLO. L. REV. 141 (1979). 39. Clark, supra note 33, at 141. 40. See Haskell, supra note 38, at 436-37. 41. Id. at 417. “Unquestionably such bargaining imbalance reflecting the traditional economic dependence of the female has influenced the courts to require an openness in the making of the contract which is not required between parties bargaining at arm's length.” Id. at 418. This Comment recognizes the advances in economic status made by women in recent years. For conclusions differing from those of Professor Haskell, see Moore, supra note 24, at 16; H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 726 (3d ed. 1980); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS SPECIAL STUDIES SERIES P-23, No. 112. 42. Kosik v. George, 253 Or. 15, 452 P.2d 560 (1969). For a discussion of undue influence and other formation defects see Odorizzi v. Bloomfield School District, 246 Cal. App. 2d 123, 54 Cal. Rptr. 533 (1966). 43. 253 Or. at 15, 452 P.2d at 560. 44. 1 C. MARKEY, supra note 30, at § 2.64(1).
analysis between California and the majority of other jurisdictions in such cases is striking.  

THE MAJORITY CONFIDENTIAL RELATIONSHIP PREJUSMPTION

In analyzing prenuptial contract disputes, the majority of jurisdictions presume that the parties are in a confidential and fiduciary relationship. Parties to an antenuptial agreement do not deal at arm's length. Their relationship is one of mutual trust and confidence. They must exercise the highest degree of good faith, candor and sincerity in all matters bearing on the proposed agreement. Thus, under the majority view, an antenuptial agreement is not analyzed as though it were an arm's-length commercial transaction.

In effect, whenever one party to the agreement gains an advantage over the other party, the majority view presumes that fiduciary obligations of fair dealing and full disclosure have been breached. If one party improves his or her position, acquires a favorable opportunity, or otherwise benefits from the antenuptial agreement, he or she has obtained an advantage. The agreement, therefore, will be subject to strict judicial scrutiny for lack of openness or fairness in its formation.

Reduced to its simplest terms, the "confidential relationship" presumption means that in certain factual situations emitting a "fragrance of fraud," the burden is on the non-rescinding party to establish full disclosure and fair dealing. For example, where the agreement's provisions for the intended wife are wholly disproportionate to the future husband's wealth and the wife later seeks its rescission, the husband will have the burden of proving that he fully disclosed the nature, extent, and value of his assets to his then

45. See infra text accompanying notes 46-98.
46. Branca & Steinberg, supra note 15, at 330 n. 65. "Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another." Estate of Cover, 188 Cal. 133, 143, 204 P. 583, 593 (1922).
48. 1 C. MARKEY, supra note 30, at § 1.47(3). This presumption arises from the trusting nature of the parties' relationship.
49. Persons entering into such a contract are in a fiduciary relationship. The party giving up an interest is placing trust in the other party and expecting him or her not to abuse that trust. Since it would be easy for the person retaining the greater interest to abuse the trust placed in him, we require that person to prove he has provided the other with full and fair information before entering into the antenuptial agreement.

Estate of Serbus v. Serbus, 324 N.W.2d 381, 385 (Minn. 1982).
fiancée, or that she already had this knowledge when she signed the agreement. The suspect provisions of the agreement will be held invalid as a matter of law unless he can meet that burden.

Applying the Majority Analysis

Applying the above analysis in Wylie v. Wylie, the Supreme Court of Arkansas refused to enforce an antenuptial agreement wherein the wife agreed to receive $50,000 upon the death of her husband in lieu of any claims, rights, or interests she might have against his estate. Following his death, Mrs. Wylie demonstrated that her husband's estate exceeded $475,000, when the agreement was signed, and she challenged the agreement's validity. The burden of proof, therefore, rested with those seeking enforcement to show that she knew or should have known of his wealth when she signed the agreement.

Although evidence presented by the proponents demonstrated Mrs. Wylie's education, business acumen, and knowledge of Mr. Wylie's reputation in the community, the court held that even if she had known he was wealthy, she could not have known the extent of his wealth. The lack of any proof as to Mr. Wylie's frankness and candor in dealing with his fiancée prior to marriage was a critical omission from the proponents' argument. Because satisfaction of this element was not proved, the antenuptial agreement failed.

The burden of proof attending the "confidential relationship" presumption is not as cumbersome as it might seem. For example, in Estate of Serbus v. Serbus, the plaintiff-wife consented in an antenuptial agreement to her husband's will, which would leave her $4,000, a life estate in the homestead and its furnishings, and funds for an adequate funeral. The trial court found that Mr. Serbus had

52. 134 Ohio St. at 260, 16 N.E.2d at 331; 253 Or. at 18, 452 P.2d at 563.
53. See supra note 52. In some circumstances the entire agreement may be invalidated, when the defective provisions are inseparable from the entire agreement.
54. 249 Ark. 316, 459 S.W.2d 127 (1970).
55. Id. at 317, 459 S.W.2d at 128.
56. Id.
57. Id. at 318, 459 S.W.2d at 129-30. Compare In re Borton's Estate, 393 P.2d 808 (Wyo. 1964) (it was sufficient that the wife knew her husband was rich, even though she did not know the extent of his wealth).
58. 249 Ark. at 320, 459 S.W.2d at 131-32.
59. Id. at 320, 459 S.W.2d at 132.
60. 324 N.W.2d 381 (Minn. 1982).
61. Id. at 383.
a net worth of approximately $148,000 at the time of the marriage.\textsuperscript{62} His attorney testified at the probate proceedings that although he had informed Mrs. Serbus of her statutory inheritance rights before she signed the prenuptial contract, he had not described his client's property to her.\textsuperscript{63} Mrs. Serbus could have received approximately $300,000 if permitted to take against the will or if no valid will had existed.\textsuperscript{64}

The Supreme Court of Minnesota declared that the $4,000 and life estate agreed to in the antenuptial agreement constituted inadequate consideration.\textsuperscript{65} Thus, fraud in the formation process was presumed.\textsuperscript{66} However, the proponent of the agreement was able to rebut this presumption by showing that Mrs. Serbus knew the extent of her husband’s property when she signed the antenuptial agreement.\textsuperscript{67} The proponent accomplished this with the drafting attorney’s testimony and the written terms of the agreement, which included the statement by Mrs. Serbus that she was “familiar with the nature and extent of the estate of James J. Serbus, Sr.”\textsuperscript{68}

The \textit{Serbus} case demonstrates that where fulfillment of the fiduciary obligations can be proven, the “confidential relationship” presumption does not present an insurmountable obstacle to the enforcement of antenuptial agreements. Thus, placing the burden of proof with the non-rescinding party does not necessarily decide the outcome of a particular dispute, although it does import intense scrutiny of the formation process by the judiciary.

\textbf{CALIFORNIA’S VIEW}

The rule in California is contrary to the majority view. Under California law, parties to antenuptial agreements deal at arm’s length.\textsuperscript{69} Admittedly, where fair dealing\textsuperscript{70} is lacking, the law of contracts provides that the agreement will be unenforceable.\textsuperscript{71} However, even where the provisions made for one party’s benefit are vastly

\textsuperscript{62}. \textit{Id.}
\textsuperscript{63}. \textit{Id.}
\textsuperscript{64}. \textit{Id.} at 385.
\textsuperscript{65}. \textit{Id.}
\textsuperscript{66}. \textit{Id.}
\textsuperscript{67}. \textit{Id.}
\textsuperscript{68}. \textit{Id.} at 383.
\textsuperscript{71}. \textit{Branca & Steinberg, supra} note 15, at 330.
disproportionate to the financial means of the other party, there is no shift in the burden of proof. This is the most problematic aspect of California's arm's-length analysis. The adverse consequences to individual parties, and to the law of antenuptial agreements in general, flow directly from the failure to shift the burden of proving procedural fairness.

The challenger of an antenuptial agreement, as opposed to the party advantaged by it, has the burden of proving any formation defects, including lack of fair dealing. In circumstances where the rescinding party is not the initiator of the agreement, he or she may encounter extreme difficulty in producing proof of nondisclosure, duress, or undue influence sufficient to justify a court's invalidation of the agreement. Moreover, because independent legal advice is not essential to the contract's validity, and drafting counsel is not likely to testify that fraud occurred, the challenger's dilemma becomes more acute.

The burden of proof does shift in the case of married contractors, however, where formation defects are shown. Under California Civil Code section 5103, a confidential relationship exists between a husband and wife when they contract with each other. This confidential relationship gives rise to certain fiduciary duties, the breach of which constitutes constructive fraud. Because parties to a premarital contract are by definition not yet married, neither section 5103 nor the corresponding fiduciary duties apply to them. Thus,
in cases involving identical transmutations, concealment or duress, and resultant unfairness, it will be easier to find fraud or other formation defects in a postnuptial contract than in an antenuptial agreement. This is the result of the line drawn between betrothal and marriage in applying the fiduciary standards of section 5103.

*Fernandez v. Fernandez*

The case of *Fernandez v. Fernandez* illustrates this paradox. The plaintiff-wife married the defendant-husband in a Mexican proceeding when she was nineteen and he was forty-five. She had been raised "in the old Spanish—the cloistered—sense."8 Her mother represented her throughout the marriage proceedings, including negotiating the antenuptial agreement.8

Conflicting evidence was presented at trial as to whether the bride was fully apprised of the nature, extent, and value of her husband's property before she signed the agreement. Additionally, she claimed she did not understand the effect of the agreement, which was to declare separate property regimes. The defendant admitted that the plaintiff was not present when the antenuptial agreement was drafted and that she did not have independent legal advice.8

Despite the disparity in the parties' ages and experience, the conflicting evidence, and the wife's lack of legal representation, the court of appeals refused to shift the burden of proof to the husband. The court's justification was a simple statement of the established rule in California that no confidential relationship is presumed to exist between premarital contractors.

The antenuptial agreement, in which the bride ultimately waived her right to one-half of the marital property (amounting to one, requiring standards of disclosure and fair dealing much more onerous than those imposed upon persons dealing at arm's length." Shapiro, *supra* note 12, at 79.

81. 1 C. MARKEY, *supra* note 30, at § 2.62(2); CAL. CIV. CODE § 2230 (West 1985); Dimond v. Dimond, 103 Cal. 97, 37 P. 189 (1894); Comment, *Property Settlement Agreements*, 35 S. CAL. L. REV. 174 (1962).


83. *Id.* at 793, 15 Cal. Rptr. at 381 (citing Appellant's Reply Brief at 4).

84. *Id.* at 791, 15 Cal. Rptr. at 380.

85. *Id.* In Mexico, the law requires antenuptial agreements. *Id.* at 788-89, 15 Cal. Rptr. at 378.

86. *Id.* at 792-93, 15 Cal. Rptr. at 379-80.

87. *Id.* at 789, 792, 15 Cal. Rptr. 377, 379. In Mexico, at the time of marriage, the parties elect either to be "married under the regime of separate properties or conjugal society"; roughly, they decide whether to call each other's property community or separate.


89. *Id.*

90. 194 Cal. App. 2d at 782, 15 Cal. Rptr. at 380.
approximately one million dollars at the time of the divorce) was analyzed as an ordinary commercial contract. Thus, the court of appeals imposed no fiduciary obligations on the defendant, the drafter and proponent of the agreement.

Lest the significance of the court's arm's-length approach be understated, the *Fernandez* antenuptial agreement should be analyzed as though the majority "confidential relationship" view applied. In *Wylie v. Wylie*, despite evidence showing the wife's business exposure and knowledge of her husband's reputation as a wealthy man, the proponents of the antenuptial agreement still had the burden of proving Mr. Wylie's openness in making the contract. Arguably, if the *Fernandez* court had applied the analysis used in *Wylie*, the outcome would have been different. Mr. Fernandez's frankness and candor with his bride were certainly in question because the bride's mother negotiated the agreement. Evidence on this issue was presented by both sides; however, because the court refused to impose the "confidential relationship" presumption, resolution of the full disclosure question did not affect the court's decision. According to the court, parties dealing at arm's length do not have to fully disclose their assets.

**A Defensible Position?**

Why California does not follow the majority view is unclear. While the judiciary's reluctance to usurp the legislative function in this area may be fading, California courts have traditionally

91.  Id. at 789, 798, 15 Cal. Rptr. at 378, 384.
92.  Id. at 790-91, 15 Cal. Rptr. at 377.
93.  Id. at 790, 15 Cal. Rptr. at 377.
94.  249 Ark. 316, 459 S.W.2d 127 (1970).
95.  Id. at 317, 459 S.W.2d at 128.
96.  Id. at 318, 459 S.W.2d at 129.
98.  Id.
99.  The legislative history of § 5103 gives no clue as to why prospective spouses are excluded from the confidential relationship presumption; nor do any cases answer this question sufficiently. For possible explanations, see infra text accompanying notes 103-25.
100.  See Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977). *Marvin* is the only case in which the court expressly recognizes a confidential relationship between an unmarried couple, but only by way of a footnote. In *Estate of Nelson*, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964), the fiduciary duties arising from a confidential relationship were applied to an antenuptial agreement. However, the cases cited as authority in *Nelson* involved marital property agreements. It is not clear whether the court was confused about the contractual status of engaged persons as opposed to married persons, or intended to expand the confidential relationship
refused to place prospective spouses into a confidential relationship. As in *Fernandez v. Fernandez,* the courts base their arm's-length analysis of antenuptial agreements on the theory that the parties are not married when the contract is signed and hence are not covered by the language of section 5103.

One reason for California's denial of the confidential relationship between prospective spouses may be a desire to ensure stability of contracts. Surely, if higher fiduciary standards are imposed on the parties, antenuptial agreements might fail more often. Thus, California's legislature may fear that expanding section 5103 would inject too much uncertainty into the favored enforceability of prenuptial contracts. Antenuptial agreements reflect the parties' desire for ordered demarcations of property rights, and the couple's expectations, memorialized by the agreement, should not be subjected to "constant attack."

If, however, public policy favors the institution of marriage, as the Supreme Court of California claims, perhaps a minimal sacrifice of contractual stability should be made in support of this institution. Furthermore, any instability caused by an expansion of section 5103 would be only temporary as the legal community would eventually adjust to the more stringent fairness requirements for antenuptial agreements. More importantly, expanding section 5103 could even enhance contractual stability, as clearer guidelines for formation are established.

Moreover, in light of the pro-marriage public policy, it is wrong to consider the parties entering into marriage as arm's-length adversaries. While the parties clearly seek to avoid financial risks, their engagement just as clearly demonstrates that they hold each other in higher esteem and trust than they would if they were participating in a commercial transaction.

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104. See *supra* note 30.
105. 194 Cal. App. 2d at 790, 15 Cal. Rptr. at 379.
106. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. "[T]he structure of society itself depends upon the institution of marriage . . . . The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime." *Id.*
107. See *infra* text and accompanying notes 136-40.
The extensive state regulation of marriage\textsuperscript{110} should begin when two persons become engaged, if the pro-marriage public policy\textsuperscript{111} is to be furthered. The parties to an antenuptial agreement are, after all, \textit{contemplating marriage}.\textsuperscript{112} Because marriage means that a confidential relationship exists, the law in California should encourage trust in that relationship by requiring the parties to act as fiduciaries when they contract with marriage in mind.

Another reason for legislative inaction may be the belief that the parties are adequately protected by other principles such as the common law doctrine of fraud. The legislature's recent amendment of section 5103 may be indicative of this belief. Effective January 1, 1985, when a married couple makes contractual waiver arrangements relating to rights at death, they are removed from the confidential relationship imposed by section 5103.\textsuperscript{113} While fair and reasonable disclosure and independent legal counsel are required in such cases,\textsuperscript{114} it remains to be seen whether these provisions will be construed to offer as much protection as the fiduciary standards of section 5103. It is likely, however, that the legislature intended to relax the procedural fairness requirements for such waiver arrangement, as otherwise no change would have been made in section 5103. That is, without the amendment, the fiduciary standards embodied in the confidential relationship presumption of section 5103 would continue to cover contractual waivers.

It is important to note that antenuptial agreements are excluded from even these more relaxed waiver provisions.\textsuperscript{115} Thus, the

\textsuperscript{110} Branca & Steinberg, supra note 15, at 328 n.51. "The Family Law Act makes marriage more attractive and more flexible by permitting the parties easier egress from the relationship than existed before. But it still requires them to go through the legal system in the hope that reconciliation can be effected." Respondent's Brief at 53, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977).

\textsuperscript{111} The public policy favoring marriage has been variously stated, but it seems to rest on three premises: 1. The social organization of the state is founded upon the marital relation. 2. Personal morals require the preservation of its sanctity. 3. Since the union can be dissolved only upon satisfaction of statutory requirements, a contract attempting to short-circuit the prescribed process is fraud upon the state's interest in the marriage contract. Note, \textit{Marriage, Contracts, and Public Policy}, 54 Harv. L. Rev. 473 (1941).

\textsuperscript{112} Barker v. Barker, 139 Cal. App. 2d 206, 212, 293 P.2d 85, 90 (1956). "The ceremony of marriage, the various rules of property that attach to the relation, and the accompanying legal duties and obligations encourage people to be very careful and to have a real sense of commitment before going ahead." Respondent's Brief at 53, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977).


\textsuperscript{114} Cal. Prob. Code \textsection 143 (West 1985).

\textsuperscript{115} Cal. Prob. Code \textsection 147(c) (West 1985).
legislature clearly seems to be leaving defects in the formation of antenuptial agreements to the treatment of the common law.\textsuperscript{116} As previously stated, California courts do require knowing waiver of marital property rights\textsuperscript{117} and procedural fairness\textsuperscript{118} in the formation process. Significantly, however, the burden of proof is not shifted where these requirements are allegedly lacking,\textsuperscript{119} hence, the challenger still must prove that fraud took place, and not just that the other party obtained an advantage. Thus, whether the protection afforded by the common law is "adequate" depends on how one balances the freedom and stability of contracts with the above mentioned pro-marriage policy. Furthermore, lax standards for premarital contracts often allow one party to avoid his or her marital responsibilities (e.g., providing for the needy widow or widower), which ultimately creates a burden on society\textsuperscript{120} and erodes the institution of marriage.\textsuperscript{121}

In advocating protection, one need not embrace paternalism.\textsuperscript{122} Although not yet reflected in case law, the traditional bargaining imbalance of women entering into antenuptial agreements has been steadily diminished by their rise in economic independence.\textsuperscript{123} This improvement, however, does not negate the need for recognition of a fiduciary relationship between prospective spouses. The ability to protect one's own property interests while contracting with another

\begin{footnotes}
\item[116.] "[T]he validity and effect of . . . premarital property agreement[s] shall be determined by the law otherwise applicable to the premarital property agreement[s]." CAL. Prob. Code § 147(c) (West 1985).
\item[117.] See supra text accompanying note 70-71.
\item[118.] Id.
\item[119.] Branca & Steinberg, supra note 15, at 330-31 n.65; Shapiro, supra note 12, at 79. Thus, even where knowing waiver and procedural fairness are shown to be lacking, the challenger of the agreement still must prove that fraud or other invalidating circumstances actually existed.
\item[120.] Haskell, supra note 38, at 427. In other words, the state must then support the needy widow. Of course, the rising economic independence of women (see infra text accompanying notes 122-25) negates this fear to a degree, though not completely.
\item[121.] Id. at 437. A basic tenet of the institution of marriage, and a duty imposed by law, is that each spouse is responsible for the welfare of the other. Thus, under California statutory law, a husband and wife cannot alter contractually any of their legal relations except those relating to property. CAL. Civ. Code § 4802 (West 1985). Furthermore, a "[h]usband and wife by marriage contract toward each other obligations of mutual respect, fidelity and support." CAL. Civ. Code § 5100 (West 1985).
\item[122.] "The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage." Sail’er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20, 485 P.2d 529, 541, 95 Cal. Rptr. 329, 341 (1971). See Amicus Curiae Brief in Support of Respondent, Lee Marvin, by Herma Hill Kay, Doris Brin Walker and John Sutter at 52, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1977).
\item[123.] Moore, supra note 24, at 16.
\item[124.] With more than half of all married women now employed outside the home, and with women now comprising more than half of all college students, the danger of a divorced woman becoming a welfare burden appears to be significantly less than was true in the days when the typical housewife was not expected or equipped to work outside the home. Id.
\end{footnotes}
in whom trust is placed does not automatically accompany wealth and education, for either men or women. Extending section 5103 to prospective spouses would not spawn state guardianship, rather, it would impose greater responsibility and self-determination on the parties. Simply stated, if they want their expectations to be more certain of fulfillment and their antenuptial agreement to withstand attack, the parties will have to deal openly with one another and not treat marriage as a "business arrangement." 126

SIGNS OF CHANGE: TROUBLESOME CONFUSION

In 1977, the California Supreme Court opened the door to the "confidential relationship" presumption for unmarried couples in Marvin v. Marvin. 128 Of course, Marvin did not involve an antenuptial agreement, as the parties had no intention of ever marrying. 127 Rather, Michelle Marvin claimed that she and Lee Marvin, while living together, had orally agreed to treat assets acquired during their relationship as community property. 128 At issue in Marvin was whether partners in a meretricious relationship could validly contract as to the disposition of their property. 129 The California Supreme Court answered this question affirmatively. 130

In a footnote, the Marvin court reasoned that "[i]n some instances a confidential relationship may arise between nonmarital parties, and economic transactions between them should be governed by the principles applicable to such relationships." 131 Thus, the court implicitly expanded section 5103. 132 Because the court did not limit its reasoning to unmarried cohabitants, its vague, "in some instances," termi-

124. In other words, the state would not be contracting for the parties or even limiting their right to contract with each other.
125. Estate of Serbus v. Serbus, 324 N.W.2d 381, 384 (Minn. 1982).
127. 18 Cal. 3d at 666 n.11, 557 P.2d at 117 n.11, 134 Cal. Rptr. at 826 n.11.
128. Id.
129. Id. at 670, 557 P.2d at 116, 134 Cal. Rptr. at 825.
130. Id.
132. In spite of the fact that the Marvin court opened its opinion with the qualification that the Family Law Act was not being applied to unmarried cohabitants, the broad language of footnote 22 in Marvin suggests that § 5103 is applicable to prospective spouses as well. Marvin v. Marvin, 18 Cal. 3d at 682 n.22, 557 P.2d at 121 n.22, 134 Cal. Rptr. at 830 n.22.
ology may be construed to cover prospective spouses.133

The potentially broad application of the Marvin dicta has created confusion as to whether antenuptial agreements might in fact be subject to the “confidential relationship” presumption of section 5103. It is no longer clear whether parties to an antenuptial contract deal at arm’s length, as “[t]he new rule presumably intends an ad hoc assessment of the extent to which a couple enjoys a relationship of trust and confidence.”134

As a result, prospective spouses are left with the possibility of an unguided application of the “confidential relationship” presumption to their contract. Even though prospective spouses are not fiduciaries toward one another, they may be held to fiduciary standards of fair dealing and full disclosure when entering into an antenuptial agreement.135 The parties therefore “act at their peril”136 if they do not have independent legal advice, exchange lists of assets, and otherwise deal openly.

To summarize, both the utility and popularity of antenuptial agreements in California have been widely recognized.137 As the endurance of any marriage cannot be assured, parties at least attempt to ensure their own financial well-being when the marriage ends.138 Unfortunately, these contractual expectations are now threatened by legal uncertainty.

While the majority of jurisdictions presently require prospective spouses to contract as fiduciaries so that each person’s self-interest does not outweigh the parties’ mutual trust and respect, California law in this area is clouded with confusion. In light of the Marvin court’s implicit expansion of Civil Code section 5103,139 California’s traditional arm’s-length analysis of antenuptial agreements may soon no longer be regarded as the law. Thus, parties entering into antenuptial agreements in California have neither clear guidelines for the formation process nor certainty of enforceability.

133. 3 BUREAU OF NATIONAL AFFAIRS INC. FAMILY LAW REPORTER 2617 (1977); Branca & Steinberg, supra note 15, at 330 n.65.
134. Branca, A Practitioner’s Guide to the Wages of Sin: Marvin v. Marvin, 52 L.A.B.J. 502, 504 (1977). “It may thus be necessary for each party to a nonmarital agreement to obtain independent legal counsel, as in marital separation agreements, in order to avoid a claim of overreaching or undue influence.” Id.
136. Shapiro, supra note 12, at 80.
137. See supra notes 22, 29-30, and accompanying text.
138. See supra notes 22-29 and accompanying text.
139. See supra note 133 and accompanying text.
CONCLUSION

In its possible expansion of section 5103, the Marvin court has created tremendous confusion. While the court responds to the reality that not all nonmarital relationships are adversarial, it is nonetheless beyond the court's role to suggest that "in some instances" section 5103 might be extended beyond the limits established by the legislature.

Nevertheless, Civil Code section 5103 should be amended by the legislature in order to clarify the status of premarital contractors and to establish better guidelines for the formation of antenuptial agreements. The legislature should amend section 5103 to provide as follows:

(a) Subject to subdivision (b), a person may enter into any transaction respecting property, regardless of his or her marital status.
(b) Except as provided in Sections 143, 144, and 146 of the Probate Code, in transactions between themselves, a husband and wife or prospective spouses are subject to the general rules which control the actions of persons occupying confidential relations with each other, as defined by Title 8 (commencing with Section 2215) of Part 4 of Division 3.

The proposed amendment recognizes the close and trusting nature of the prospective spouses' relationship, the public policy favoring marriage, and the necessity of clear guidelines in negotiating and drafting antenuptial agreements. It affords premarital contractors the same treatment as their married counterparts, by imposing fiduciary standards of full disclosure and fair dealing on the parties. Thus, prospective spouses will know in advance what the law expects of them when they contract with each other, and will be more certain that their contractual expectations will be fulfilled. The end result for California is a more realistic and more clearly expressed statement of the law, which benefits not only prospective spouses but the legal community as well.

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140. Because, under Probate Code § 147(c), prospective spouses are exempt from Probate Code §§ 143, 144, and 146, the proposed amendment would have the effect of leaving the premarital contractors in the confidential relationship of Civil Code § 5103 even when they are bargaining for waiver of rights upon the death of one spouse. Thus, as far as such waivers are concerned, prospective spouses might be placed on more than equal footing with their married counterparts, depending, of course, on judicial interpretation of all the relevant code provisions. CAL. PROB. CODE §§ 140-47 (West 1985); CAL. CIV. CODE § 5103 (West 1985). See also supra notes 113-21 and accompanying text.