

'Burkle' Decision Is a Primer on Postmarital Agreements

By Mitchell A. Jacobs and David Marcus

Unsatisfied with her postmarital agreement providing her with more than \$30 million upon dissolution of her marriage, Janet Burkle, the wife of Ron Burkle, claimed that her post marital agreement was invalid. In an exhaustive analysis of the law regarding postmarital agreements, the court in *In re: Marriage of Burkle*, 139 Cal.App.4th 712 (2006), enforced the parties' agreement. The court established several rules in this contentious area of the law, including that postmarital agreements will be presumed to be procured by undue influence only if one party obtains an unfair advantage over the other.

The Burkles were married in 1974. In 1997, Ms. Burkle filed a dissolution of marriage action using a certified family law specialist. A few months later, the parties reconciled and entered into a postmarital agreement that resolved all present and future financial issues between them. Then, in June of 2003, Ms. Burkle filed another petition for dissolution of marriage, alleging that the postmarital agreement was invalid.

Some of the relevant portions of the agreement were a (1) list of what Mr. Burkle believed was the community property, his separate property, and the values of the property, (2) that the appreciation on community property would be Mr. Burkle's separate property, and he would pay Ms. Burkle \$1 million each year as her share of the community income, (3) upon dissolution of marriage, Mr. Burkle would be awarded all of the community property, and he would pay Ms. Burkle approximately \$30 million, paid over several years, purchase a

home for her worth approximately \$3 million, and pay family support for five years (the opinion suggests that the amount of support would be approximately \$400,000 to \$500,000 per year), and (4) Ms. Burkle waiver of spousal support.

The agreement also included a certification by Ms. Burkle's attorney that he fully explained the effect of the agreement to her as well as her acknowledgment she understood the effect of the agreement and a statement that Ms. Burkle desired financial security without risk of loss. Finally, the contract stated that neither party obtained an unfair advantage over the other and that Ms. Burkle's attorneys and accountants had at least six months to conduct a thorough, independent review of Mr. Burkle's finances.

At the trial, Ms. Burkle argued that she did not sign the agreement freely because she was depressed and emotionally dependent upon her husband. She also argued that Mr. Burkle did not disclose potential business mergers which increased the value of the community business by millions of dollars. The trial court held that the agreement was enforceable. The Court of Appeal affirmed.

The court first analyzed which party had the burden of proof regarding the validity of the agreement. Ms. Burkle argued that if one spouse gains an advantage over the other, that spouse must prove that the agreement was not obtained by undue influence. The court rejected that view and held that in the context of an agreement entered into during the marriage, the presumption of undue influence arises only if one spouse obtains an unfair advantage over the other.

While prior opinions on this issue did not explicitly state that this advantage must be unfair, the court reasoned that the essence of the advantage gained by one of the spouses in those cases was their unfairness. For example, in one case, a spouse transferred his interest in real property to the other spouse with no consideration.

The court did not specify what constitutes such unfair advantage because it found that the parties mutually benefited from the agreement. Ms. Burkle was to receive a substantial amount of money upon divorce, and \$1 million per year during the marriage. But it did say what unfair advantage is not. The court established what appears to



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The case between billionaire Ron Burkle and his former wife led to an exhaustive analysis of postmarital agreements.

be a per se rule that "[a] presumption of undue influence cannot logically be applied in a case where benefits are obtained by both spouses, where the spouses are represented by sophisticated counsel, and where the spouses expressly acknowledge that

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neither has obtained an unfair advantage as a result of the agreement."

Accordingly, it was Ms. Burkle's burden to show that the agreement was invalid without any presumption of undue influence.

Even if the presumption of undue influence applied, the court found that substantial evidence supported the trial court's finding that it was rebutted. The court made numerous findings that Ms. Burkle entered the agreement freely, voluntarily and with no duress, fraud, medical condition or undue influence. She had full knowledge of all

of the relevant facts, and her attorneys and accountants had full opportunity to conduct their investigation. The possible business mergers were disclosed in general terms to Ms. Burkle and her attorney.

Ms. Burkle then unsuccessfully argued that her husband committed actual and constructive fraud by not supplying her with detailed information concerning the mergers, even though she did not request them. The court agreed with Mr. Burkle, reasoning that the potential and possibility of the mergers were disclosed to Ms. Burkle, and that the documents regarding the mergers were available for Ms. Burkle to review, but she decided (or her advisers decided) not to review them — at her peril.

The court also ruled that the financial disclosures required by California Family Code Section 2100 et seq. do not apply when parties to a dissolution action place their case in abeyance and enter into an agreement in contemplation of resuming their marriage. Family Code Section 2105(a) provides that each spouse must disclose his or her income, assets and debts to the other before they "enter into an agreement for the resolution of property or support issues." These disclosures must be made using specific Judicial Council forms. The court held the agreement referenced in these statutes do not apply to postmarital agreements of parties who have put their divorce case in abeyance.

Ms. Burkle next argued that Mr. Burkle breached the agreement by not performing, so she was entitled to rescind the agreement. Specifically, she argued that after she filed the petition, he tendered an insufficient payment which he claimed was the amount due at that time under the agreement. The court rejected this argument, too, reasoning that Mr. Burkle's performance was excused because Ms. Burkle claimed in her petition and her discovery answers that the agreement was unenforceable.

Finally, the court held that Ms. Burkle ratified the agreement, and was estopped from claiming it was invalid because she accepted the benefits of the agreement for more than five years. Also, the court held that length of time before she complained about the agreement was unreasonable, considering she knew about her husband's financial successes during those five years and accepted the agreement's benefits. This opinion gives practitioners a road

map to maximize the enforceability of a postmarital agreement. An attorney preparing such agreements should carefully review the statements of intent, recitals, acknowledgments and factual findings recited in the opinion. Often the statements of intent and acknowledgments are glossed over as boilerplate, but *Burkle* shows how much they truly matter.

Attorneys should also seriously consider whether or not to include in the agreement provisions that they explained the agreement to the client, and they believe the client understands the agreement. These provisions, known as attorney certifications, are not usually included in commercial, arm's-length business contracts, but have become common in premarital and postmarital agreements. *Burkle* gives these clauses new strength against enforceability challenges by spouses.

The attorney representing a party waiving rights may consider not signing an attorney certification. If the attorney wants written confirmation that he or she advised the client regarding the legal effect of the agreement (possibly for malpractice purposes), the attorney may consider sending the client a side letter to sign. That letter presumably will be protected from discovery by the attorney-client privilege.

The opinion also highlights the importance of full disclosure of financial information and offers for the other spouse to review additional documents. Ms. Burkle and her advisers had over six months to conduct their investigation. Clients should be advised that if the other party is not provided with a sufficient amount of time for his or investigation, the validity of the agreement could be undermined. Conversely, the chances of the agreement being enforced are increased if the parties are represented by experienced family law attorneys.

Burkle should be mandatory reading for attorneys preparing postmarital agreements, as it examines most aspects of this area of the law.

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