3-1-2000

Show Her the Money: The California Court of Appeal's Mistake Concerning in Re Marriage of Bonds

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Recommended Citation

Available at: http://digitalcommons.lmu.edu/elr/vol20/iss2/10
SHOW HER THE MONEY: THE CALIFORNIA COURT OF APPEAL’S MISTAKE CONCERNING
IN RE MARRIAGE OF BONDS

I. INTRODUCTION

Most people can only dream of accumulating the millions of dollars professional athletes earn each year.1 Even those professional athletes who make less than their leagues’ average are greatly compensated because of minimum salary floors.2 These salaries continue to increase dramatically.3

Similarly, the divorce rate among professional athletes has increased.4 Although the general population’s divorce rate in the United States is a

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1. See Lois Caliri, Cox Communications’ Cable Clients in Roanoke, Va., Area See Rate Increases, ROANOKE TIMES, Mar. 29, 1999, available in LEXIS, News Library, News Group File, Most Recent Two Years (stating the average salary of a football player in the National Football League (“NFL”) was $1.39 million in 1997); see also Tim Kawakami, Fox Agrees to Six-Year Deal, L.A. TIMES, Aug. 5, 1999, at D8 (mentioning the average salary of a basketball player in the National Basketball Association (NBA) is between $3.03 million (NBA figure) and $3.27 million (player’s union figure)); New Kagan Report on Hockey Business Highlights Coming Face-Off in League/Player Salary, Revenue Dispute, Bus. Wire, Aug. 26, 1999, available in LEXIS, News Library, News Group File, Most Recent Two Years [hereinafter New Kagan Report]; David Williams, Interest Wanes for Pro Fans, COM. APPEAL (Memphis, TN), Sept. 30, 1999, at D1, available in LEXIS, News Library, News Group File, Most Recent Two Years (noting the average salary of a Major League Baseball (“MLB”) player was $1.7 million in 1999).

2. See Shav Glick, At Least They’re Keeping a Roof Over Their Heads, L.A. TIMES, Aug. 27, 1999, at D2. The minimum salary of a veteran football player in the NFL is $400,000. See id.

3. See John K. Harris, Jr., Essentials of Estate Planning for the Professional Athlete, 11 U. MIAMI ENT. & SPORTS L. REV. 159, 161 (1993) (noting professional athletes are experiencing increases in compensation and paid endorsements); New Kagan Report, supra note 1 (finding from 1992 to 1999 average salaries increased 157% in hockey (NHL), 125% in basketball (NBA), 53% in football (NFL), and 23% in baseball (MLB)); Jimmy Smith, Empty Seats Send Fans’ Message Loud and Clear, TIMES-PICAYUNE (New Orleans), May 23, 1999, at C2, available in LEXIS, News Library, News Group File, Most Recent Two Years (showing professional athletes’ salaries have increased 30% in the last three years).

4. See Harris, supra note 3, at 161 (noting an increase in the number of second and third marriages for professional athletes).
startling fifty percent,⁵ there appears to be an even greater likelihood of divorce among retired professional athletes.⁶

Given professional athletes' increasing salaries, and their likelihood of divorce, prenuptial agreements are very attractive options for them.⁷ Additionally, some athletes fear that potential mates are merely marrying them for their money.⁸ Thus, it is understandable why professional athletes feel the need to protect their assets with prenuptial agreements defining what constitutes their own separate property.⁹ These agreements provide a means of avoiding the default rule in community property jurisdictions¹⁰ that all marital property is divided equally upon divorce.¹¹

In light of the benefits of prenuptial agreements, it is easier to understand why Barry Bonds, a professional baseball player for the San

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6. Although there is almost no data on the divorce rates of retired athletes, the athletes themselves seem to think divorce among their ranks is a far more prevalent problem than in the general population. See Lori Rotenberk, Making the Family a Team, CHI. SUN-TIMES, Mar. 15, 1998, at 44, available in 1998 WL 5572261. Mike Singletary, a retired professional football player, noted he believes the divorce rate among retired professional athletes is approximately 86%. See id. Reggie White, a retired professional football player, attributes the high divorce rate among retired professional athletes to the fact they do not have a purpose after finishing their careers. See Packers' White Picked NFL's Defensive MVP, TIMES-PICAYUNE (New Orleans), Jan. 7, 1999, at 3D, available in 1999 WL 4386357.
7. A prenuptial agreement can be referred to as an antenuptial agreement, antenuptial contract, premarital contract, premarital agreement or a marital settlement. BLACK'S LAW DICTIONARY 1200 (7th ed. 1999). A prenuptial agreement is defined as “[a]n agreement made before marriage usu[ally] to resolve issues of... property division if the marriage ends in divorce or by the death of the spouse.” Id. Hereinafter, antenuptial or premarital agreements will be referred to as prenuptial agreements.
8. See, e.g., Bruce Newman, The Very Model of a Modern Marriage, SPORTS ILLUSTRATED, Aug. 4, 1986, at 34, 38. Nancy Lopez, a professional golfer explains when she married her first husband, a sportscaster, she feared he was marrying her for her money. See id. She later divorced him and married a successful baseball player, Ray Knight. See id. at 34, 38. Lopez says when she married Knight, she did not have this same fear because he had his own money. See id. at 38.
10. See Blaine D. Beckstead, Comment, Understanding and Applying I.R.C. §66, 33 IDAHO L. REV. 567, 578–79 n.97 (1997) (citing a number of statutes supporting this proposition).
Francisco Giants, executed a prenuptial agreement. Seven years after Barry Bonds and his prospective wife signed a prenuptial agreement, the marriage broke down. The validity of the couple’s prenuptial agreement became an important issue in their divorce. The trial court upheld the agreement, but the California Court of Appeal reversed the lower court’s decision. Barry Bonds appealed, and now awaits the California Supreme Court’s decision.

This Note discusses the California Court of Appeal’s refusal to uphold Barry Bonds’ prenuptial agreement in In re Marriage of Bonds. It argues the appellate court discounted the agreement’s choice-of-law clause for the wrong reasons, but correctly applied California law. Further, this Note explains how the appellate court’s desire to save Bonds’ wife from the prenuptial agreement resulted in a departure from California law. Specifically, the court improperly created a heightened level of judicial scrutiny for prenuptial agreements. Part II explores prenuptial agreement law, the Uniform Premarital Agreement Act (“UPAA”) and California’s approaches to choice of law issues. Part III discusses In re Marriage of Bonds. Part IV analyzes whether the court was correct in discounting the choice-of-law clause, in applying California law to the case and in applying a strict level of scrutiny to determine whether the agreement was signed voluntarily. Part V proposes legislatures should require both parties entering into a prenuptial agreement to have independent legal counsel. Finally, Part VI concludes although the choice-of-law clause in the Bonds’ prenuptial agreement was improperly dismissed, the correct law was applied. The court should not have required independent legal counsel because heightened scrutiny of the prenuptial agreement was an improper level of review.

15. See Bonds, 83 Cal. Rptr. 2d at 787.
17. 83 Cal. Rptr. 2d 783 (Ct. App. 1999).
II. BACKGROUND OF THE LAW

A. California's Community Property Scheme

California's marital property laws are based on a community property system. Under this system, all property acquired by a spouse before marriage and all property given or devised to that spouse during the marriage are considered that spouse's separate property. The spouse who acquired this separate property has the sole power to manage and control it during the marriage and accordingly upon divorce.

By contrast, any property acquired or earned by a spouse during the marriage is considered community property. This includes earnings received by a spouse during the marriage. During the term of the marriage, both spouses have joint management power over all community property and either spouse can dispose of such property without the consent of the other spouse. Upon divorce, each spouse receives one-half of the community property.

The community property system views marriage as a community to which each spouse contributes, regardless of the actual division of labor.

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18. See Gail Boreman Bird, Cases and Materials on California Community Property 5 (6th ed. 1994). California’s community property scheme is based on the Spanish civil law system of dividing property into separate and community property. See Prager, supra note 11, at 6.


20. See Cal. Fam. Code § 752 (West 1994). “[N]either husband nor wife has any interest in the separate property of the other.” Id. By means of inference, any separate property acquired during the marriage is the property of that spouse, which includes the right to control and manage the property. See Prager, supra note 11, at 7.


23. See Elizabeth De Armond, It Takes Two: Remodeling the Management and Control Provisions of Community Property Law, 30 Gonz. L. Rev. 235, 237 & n.4 (1994–1995) (noting, with few restrictions, either spouse can dispose of his or her own one-half interest as well as his or her spouse’s interest).

24. See Prager, supra note 11, at 6 n.28.


26. See De Armond, supra note 23, at 249.
or which spouse earned the property. Consequently, each spouse is entitled to an equal share in the community property.

In a community property state, any salary earned by an athlete during the marriage is considered community property. The community property system, with very few restrictions, also provides the non-athlete spouse with equal management power over these earnings. This system serves to reward contributions of non-athlete spouses, such as managing the household and caring for the children.

The other property scheme in the U.S. is the modern common law system of separate property. In contrast to community property, common law deems the property acquired or earned by one spouse during the marriage as the separate property of that spouse unless the couple agrees to jointly own the property. The most significant difference between the two systems becomes apparent at divorce. Unlike the community property system, which divides community property equally between the spouses at divorce, the common law system divides the marital and separate property based on principles of equity. However, many common law jurisdictions are moving toward adopting the fifty-fifty distribution system of community property schemes.

**B. Prenuptial Agreements: Uniform Premarital Agreement Act versus Common Law**

Although California presumes all property bought or earned during the marriage is community property, prenuptial agreements can alter the rights of prospective spouses. The prenuptial agreement is a vehicle for

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27. See Prager, supra note 11, at 6.
28. See De Armond, supra note 23, at 249.
29. See Wilson, 518 P.2d at 167 (noting money earned by a spouse during the marriage is community property).
30. See De Armond, supra note 23, at 237.
31. See supra notes 26–27 and accompanying text.
33. See BLUMBERG, supra note 25, at 6 (noting common ownership in a common law jurisdiction is possible only by explicit choice).
34. See id. at 7.
35. See id. at 4–5.
36. See id. at 5.
37. See Prager, supra note 11, at 6; CAL. FAM. CODE § 760 (defining what constitutes community property).
38. See CAL. FAM. CODE § 1500 (West 1994).
transmuting separate property into community property and vice-versa. In effect, prospective spouses can opt out of the community property scheme.

1. Common Law Treatment of Prenuptial Agreements

Before the enactment of the UPAA, most states had little statutory guidance concerning prenuptial agreements. Parties entering into such contracts had to rely on the common law. As a result, the body of common law that developed lacked uniformity. Common law remains the source of law relating to prenuptial agreements for those states that have not adopted the UPAA. However, the common law creates an important framework for understanding the workings and goals of the UPAA.

Under California’s pre-UPAA common law, prenuptial agreements were held valid and enforceable as long as they met certain criteria. In the seminal case, In re Marriage of Dawley, the California Supreme

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40. See Beckstead, supra note 10, at 578–79 n.97 (mentioning parties can use prenuptial agreements or contracts during the marriage to “opt out” of a community property system).


43. See id.

44. See Laura P. Graham, Comment, The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage, 28 WAKE FOREST L. REV. 1037, 1038 (1993); Atwood, supra note 42, at 137–38 (noting that states emphasize different aspects of procedural fairness and take different approaches relating to substantive fairness for prenuptial agreements).

45. See Atwood, supra note 42, at 136.


The first apparent case in California in which a prenuptial agreement disposing of assets upon divorce was held to be valid was Barker v. Barker, 293 P.2d 85 (Cal. Dist. Ct. App. 1956). In Barker, a prenuptial agreement stipulated certain real and personal property would remain the separate property of each spouse. See id. at 88. The court held the prenuptial contract was enforceable because it did not relieve the parties of their marital obligations by limiting spousal support, child support, or alimony. See id. at 90.

Court defined which prenuptial agreement terms violated public policy and were not the proper subject of such agreements. The court held that prenuptial agreements were not void merely because the parties contemplated divorce. Rather, the court only invalidated those agreements whose terms objectively promoted divorce. Thus, the court ruled prenuptial agreements classifying prospective spouses' earnings while married as separate property were not against public policy. The court went on to enumerate several terms which it viewed as promoting divorce: any waiver or reduction of spousal support rights or child support; any lump sum settlement of all rights in the event of divorce; or any attempt to limit costs and attorneys' fees arising out of divorce. In short, Dawley significantly restricted the public policy exception to the enforcement of prenuptial agreements in California. Although California currently prescribes to the UPAA, those states that continue to rely on the common law adhere to some of the same public policy exceptions as California's pre-UPAA common law.

2. The Common Law's Substantive and Procedural Requirements for Prenuptial Agreements

Under the common law, prenuptial agreements must satisfy the same basic requirements as any other contract: the agreement must have been formed by a valid offer, acceptance and consideration. However, in addition to the basic contract requirements, a prenuptial agreement must be substantively fair and meet the procedural standards of fair dealing.

48. See generally id.
49. See id. at 325.
50. See id.
51. See id.
52. See id. at 328–29.
53. See Dawley, 551 P.2d at 328 & n.5; Branca & Steinberg, supra note 46, at 338.
54. See Dawley, 551 P.2d at 329; Pereira v. Pereira, 103 P. 488, 489 (Cal. 1909) (holding a term providing for a lump sum settlement of all rights in the event of a divorce is void as against public policy).
55. See Dawley, 551 P.2d at 330; Whiting v. Whiting, 216 P. 92, 95 (Cal. Dist. Ct. App. 1923) (holding a term limiting costs and attorneys' fees one spouse could be forced to pay the other spouse by a court in case of a divorce is void as against public policy).
56. See Homer H. Clark, Antenuptial Contracts, 50 COLO. L. REV. 141, 148 (1979) (noting prenuptial agreements that fix maintenance or alimony are invalid).
57. See Branca & Steinberg, supra note 46, at 327.
58. See id. at 330. For instance, courts might find there is a lack of consideration when one spouse "relinquishes valuable rights for little in return." Id. Before Arizona adopted the UPAA, the state relied on the substantive and procedural requirements of the common law for enforcing a prenuptial agreement. See Hess v. Hess (In re Marriage of Hess), No. 1 CA-CV 91-0233, 1 CA-
Fair dealing requires the parties fully disclose all assets. It also requires the couple knowingly and voluntarily enter into the agreement free from undue influence, coercion and fraud. In determining whether an agreement was executed voluntarily, a court will also consider timing, the non-drafting spouse’s knowledge of the underlying legal rights, knowledge and understanding of the terms of the agreement, and availability of independent legal advice to the non-drafting spouse.

The absence of independent legal advice does not automatically imply a prenuptial agreement is tainted by fraud or undue influence. Instead, courts have held the availability of independent legal counsel is only one factor in determining the validity of a prenuptial agreement. No state has gone so far as to require independent legal counsel for the enforcement of prenuptial agreements.

In addition to procedural fairness, an agreement has to be substantively fair when the couple executes the agreement and at the time of the divorce. In determining whether an agreement is substantively fair, courts consider a number of factors, including:

1. the financial situation of each party;
2. their respective ages;
3. their respective property;
4. their family ties and connections;
5. all of the circumstances leading to the execution of the agreement;
6. their marriage altogether;
7. their actions after the marriage as tending to show whether the agreement was understandingly made; and
8. the [non-drafting spouse’s] needs.


59. See Branca & Steinberg, supra note 46, at 330.

60. See id. “Knowingly” connotes an individual acting willfully with awareness of the nature of his or her conduct. See BLACK’S LAW DICTIONARY 876 (7th ed. 1999). As a result, coercion defeats the voluntariness requirement of fair dealing because it involves compelling a person to do something by force. See id. at 252. Similarly, fraud, an intentional misrepresentation of the truth, also invalidates a prenuptial agreement because the innocent party signing the agreement lacks full awareness of the consequences. See id. at 670.


63. See id.

64. See id.

65. See id.

66. Branca & Steinberg, supra note 46, at 311–32; Clark, supra note 56, at 151.
However, the substantive prong has little weight on its own.\textsuperscript{67} It is merely another method of determining whether the waiver of property rights was made knowingly and intelligently, and was free from undue influence.\textsuperscript{68}

\textbf{C. The Impact of the Uniform Premarital Agreement Act on Prenuptial Agreements}

The sexual revolution of the 1970’s triggered an explosive increase in prenuptial agreements during the 1980’s.\textsuperscript{69} The increase of post-divorce remarriages resulting from the cultural shifts of the 1970’s prompted more couples to enter into prenuptial agreements in order to plan their economic futures more carefully.\textsuperscript{70} The lack of uniformity in states’ treatment of prenuptial agreements led the National Conference of Commissioners on Uniform State Laws to promulgate the UPAA in 1983.\textsuperscript{71} On January 1, 1986, California’s version of the UPAA went into effect.\textsuperscript{72}

The UPAA requirements for enforcement of prenuptial agreements are as follows:

(a) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that: (1) that party did not execute the agreement voluntarily; or (2) the agreement was unconscionable when it was executed and, before the execution of the agreement, that party: (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the other property beyond the disclosure provided; and (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.\textsuperscript{73}

The burden of proof rests on the challenger of the prenuptial agreement to prove the agreement is unenforceable.\textsuperscript{74}

\textsuperscript{67} See id. at 333.
\textsuperscript{68} See id.
\textsuperscript{69} See Marston, supra note 9, at 891. Between 1978 and 1988, it is estimated that the number of prenuptial agreements had tripled. See id.
\textsuperscript{70} See id. at 891 & n.25.
\textsuperscript{71} See UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369; see also Graham, supra note 44, at 1049.
\textsuperscript{72} See Atwood, supra note 42, at 127 n.4. Twenty-six states have adopted the UPAA. See UNIF. PREMARITAL AGREEMENT ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 9B U.L.A. 83 (Supp. 1999).
\textsuperscript{73} UNIF. PREMARITAL AGREEMENT ACT § 6(a), 9B U.L.A. 376 (1987).
\textsuperscript{74} See id.
The UPAA sought to bring certainty to prenuptial agreements by standardizing their validity requirements and treating them like ordinary contracts. The UPAA is greatly criticized because it does not invalidate grossly unconscionable prenuptial agreements if the parties fully disclosed all of their assets prior to signing the agreement. Under the UPAA, occurrences not envisioned at the time of contracting could render a prenuptial agreement grossly unfair at divorce, but the agreement would nonetheless be enforced as long as the parties fully disclosed all of their assets.

The UPAA also permits parties to challenge agreements that are entered into involuntarily. However, the drafters cite only one case, Lutgert v. Lutgert, to explain the term "voluntary." In Lutgert, a bride was presented with a prenuptial agreement for the first time just hours before the marriage. The court ruled the bride entered into the agreement involuntarily, reasoning the bride was pressured into signing the agreement. The comments to the UPAA indicate the drafters intended to broadly interpret involuntariness. However, parties currently have to rely on common law cases regarding voluntariness because there are almost no cases interpreting the term under the UPAA.

75. See Graham, supra note 44, at 1050; Marston, supra note 9, at 899.
76. The doctrine of unconscionability allows a court to deny enforcement of substantively unreasonable contracts or contract terms. See 1 Witkin Summary of California Law § 33 (9th ed. 1987). These contracts generally involve overly harsh terms or one-sided contracts. See id.
77. See Marston, supra note 9, at 899.
78. See Atwood, supra note 42, at 146–47.
79. See Unif. Premarital Agreement Act § 6(a)(1), 9B U.L.A. 376 (1987); see also Atwood, supra note 42, at 128. Like the common law rules, the UPAA proscribes fraud and duress in the execution of prenuptial agreements. See supra note 60 and accompanying text; see also Brandt, supra note 61, at 546. The UPAA does not specifically prohibit fraud and duress, but does so implicitly. See Brandt, supra note 61, at 546; Unif. Premarital Agreement Act § 6(a)(2), 9B U.L.A. 376 (1987). It requires fair and reasonable disclosure of all property and financial obligations, and requires that the agreement be signed voluntarily. See Brandt, supra note 61, at 546.
82. See Lutgert, 338 So. 2d at 1114. Although the idea of a prenuptial agreement had been mentioned on previous occasions, the bride contended she had objected to the idea every time. See id.
83. See id. at 1117.
84. See Brandt, supra note 61, at 546.
85. The UPAA comments state that section 6(a) is intended to be comparable to the statutory or common law requirements of many jurisdictions. See Unif. Premarital
An important difference between common law and the UPAA is that common law requires prenuptial agreements to be fair and equitable,\textsuperscript{86} while the UPAA only protects against unconscionability.\textsuperscript{87} The two concepts differ because unconscionability requires extreme unfairness.\textsuperscript{88} However, even where unconscionability exists, a spouse nonetheless receives little protection under the UPAA, because in order to invalidate a prenuptial agreement on grounds of unconscionability, there must also be a failure to disclose all assets.\textsuperscript{89}

The UPAA also differs from the common law because it places the burden of proof on the person challenging the prenuptial agreement’s validity, whereas some common law states place the burden of proof on the person arguing in favor of the agreement.\textsuperscript{90} Consequently, the UPAA treats prenuptial agreements more favorably.\textsuperscript{91}

\subsection*{D. Choice-of-Law Clauses and the Use of Conflict of Laws Rules in the Absence of Such Clauses}

A choice-of-law clause allows contracting parties to select a particular state’s laws to apply should a dispute arise.\textsuperscript{92} Choice-of-law clauses in prenuptial agreements are specifically used to predict and control the outcome of possible litigation arising from contractual disputes involving materially different laws of multiple states.\textsuperscript{93}

\textsuperscript{86} See supra note 65 and accompanying text.


\textsuperscript{88} See supra note 76 and accompanying text.


\textsuperscript{90} Compare UNIF. PREMARITAL AGREEMENT ACT § 6, 9B U.L.A. 376 (1987) (noting the person challenging the prenuptial agreement has the burden of proof), with Spector v. Spector, 531 P.2d 176, 185 (Ariz. Ct. App. 1975) (showing Arizona’s pre-UPAA common law placed the burden of proof on the person desiring enforcement of the prenuptial agreement).

\textsuperscript{91} See supra notes 87–90 and accompanying text.


Choice-of-law clauses are particularly important for professional athletes because they travel extensively and do not always live in the state in which their teams are based. An athlete can conceivably spend more than half of his or her time in a state different from that of his or her spouse. That state’s prenuptial agreement laws may be substantially different from the laws of the state in which an athlete’s spouse resides. Thus, the question of which state’s laws should apply to an athlete’s prenuptial agreement can be a significant issue.

However, athletes can avoid this uncertainty by including choice-of-law clauses in their contracts. Choosing a particular state’s laws to govern a prenuptial agreement is a convenient way to avoid dispute over that issue and perhaps to avoid litigation altogether. For instance, an athlete may choose a UPAA state to govern because the UPAA favors the enforceability of prenuptial agreements.

Whenever a choice-of-law clause is incomplete or ambiguous, a court generally looks to traditional contract interpretation principles to give effect to the mutual intentions of the contracting parties. A court may also use extrinsic evidence to determine the intended meaning of an ambiguous choice of law term. If this fails, contract principles call for the court to

94. See Jeffrey L. Krasney, State Income Taxation of Nonresident Professional Athletes, 2 SPORTS L.J. 127, 128 n.2 (1995). Professional athletes, such as, baseball, basketball, football and hockey players will spend approximately half of their seasons in their teams’ state and the other half traveling to other states. See id. These seasons generally last about six months out of the year. See id. With pre-season and post-season travel, professional athletes can travel up to seven and one-half months in any given year. See id.

95. See id. at 130. Many professional athletes file tax returns in two states: the state in which the athlete resides or is domiciled and the state in which the athlete plays home games. See id.

96. Because athletes may spend up to seven and one-half months out of the year traveling, it follows they spend less than half a year at home. See id. at 128 n.2.


98. See Kelson, supra note 93, at 1337.

99. Because lending contracts involving different states can lead to conflict of laws problems, choice-of-law clauses are often used to bring more certainty to these contracts. See id. The same holds true for prenuptial agreements.

100. See Bauerfeld, supra note 93, at 1669 & n.58.


102. See CAL. CIV. CODE § 1636 (West 1985).

103. See Powers v. Dickson, 63 Cal. Rptr. 2d 261, 266 (Ct. App. 1997). Under the rules of parol evidence, extrinsic evidence can be used to explain ambiguous contract terms as long as the evidence does not contradict the language in the contract. See id.
interpret the clause against the party who drafted the contract. For example, if the drafter of an ambiguous choice-of-law clause intended for Idaho's laws to apply to the contract, while the other party desired application of Alaska law, the ambiguous clause would be interpreted against the drafter. Thus, the court would apply Alaska law.

California courts generally look to the *Second Restatement on Conflict of Laws* for guidance when determining whether a valid choice-of-law clause in a prenuptial agreement should be upheld. The *Restatement* provides:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one in which the parties could not have resolved by an explicit provision in their agreement directed to the issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Although the *Restatement* suggests choice-of-law clauses will generally be upheld, its public policy exception gives courts the flexibility to invalidate such clauses. This is because the *Restatement* provides little guidance as to what constitutes a fundamental public policy. In addition, the *Restatement* directs courts to give states' interests and general regulatory powers deference. Thus, the *Restatement*’s fundamental public policy exception makes the validity of choice-of-law clauses uncertain in California.

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104. See id. at 266–67. Interpreting a contract against the party who drafted the contract is warranted when the contract is ambiguous and the rules of contract interpretation cannot make it any more certain. See id.


108. See Kelson, supra note 93, at 1352, 1358.

109. See id. at 1358.

110. See id.

111. See id. at 1358–59.
When a choice-of-law clause is either absent from a prenuptial agreement or is deemed invalid, a court looks to conflict of laws principles to determine which state's law applies.\footnote{See Bauerfeld, supra note 93, at 1660, 1662.} In California, courts use the comparative impairment approach to resolve conflict of laws issues.\footnote{See Joseph A. Zirkman, Comment, *New York's Choice of Law Quagmire Revisited*, 51 BROOK. L. REV. 579, 608 (1984).}

Under the comparative impairment approach, the forum court's laws are applied unless a party makes a motion to apply a different state's laws.\footnote{See Holly Sprague, Comment, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CAL. L. REV. 1447, 1455 (1986).} When such a motion is made, the court must determine if each of the involved states has an actual policy interest in applying its specific laws to the case.\footnote{See Bernhard v. Harrah's Club, 546 P.2d 719, 721–23 (Cal. 1976).} Where only one state has an actual policy interest, that state's law will normally be applied.\footnote{See Wong v. Tenneco, Inc., 702 P.2d 570, 582 (Cal. 1985). When only one state has an interest in applying its laws, the conflict is deemed false, giving rise to the term "false conflict." See id.} If, on the other hand, both states have an interest in applying their laws, the court employs the comparative impairment approach to resolve the conflict.\footnote{See Bernhard, 546 P.2d at 723.}

Under the comparative impairment approach, the court categorizes the conflicting interests as internal and external.\footnote{See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 17 (1963).} Internal interests are the objectives underlying a state's laws relating to private dispute resolution.\footnote{See id.} External interests are the state's interests in applying its laws to disputes between private parties.\footnote{See id.}

Having distinguished the relevant internal and external interests, the court must identify which state's internal interests would be impared the most in terms of general scope and impact should its laws not be applied.\footnote{See id. at 18.} The court then applies that state's laws to the dispute.\footnote{See id. at 17–18.} The court focuses on internal interests in this analysis as opposed to the external interests.\footnote{See id. at 17–18.
III. IN RE MARRIAGE OF BONDS

A. Background and Facts

In 1985, Susann Margreth ("Sun") left her home in Sweden to live with her father in Montreal, at the age of twenty-one. In August 1987, Barry Bonds (Barry) and Sun, both twenty-three years old, met in Montreal. At the time, Barry played major league baseball for the Pittsburgh Pirates, earning $106,000 a year. Sun worked in a restaurant and attended cosmetology classes with the goal of someday opening her own business to service celebrities’ beauty needs.

After spending some time together, Sun moved to Arizona to live with Barry in November of 1987. Shortly thereafter, they decided to get married, and did so on February 7, 1988, in Las Vegas. At Barry’s request, the couple entered into a prenuptial agreement before marrying. Seven years later, the couple sought a divorce, spurring a legal battle over the validity of their prenuptial agreement.

Barry claimed he and Sun frequently discussed their desire to keep their finances separate from each other. According to Barry, Sun assured him “she did not want any of his money or to be dependent upon anyone.” Barry maintained he had made it clear Sun would have to sign a prenuptial agreement prior to their marriage and Sun had agreed to do so. Barry then retained two attorneys in Arizona, Leonard Brown and Sabina Megwa, to draft the agreement.

Barry and Sun prepared lists specifying their respective assets. Brown testified it was his impression both parties wanted an agreement

125. See id.
126. See id.
127. See id.
128. See id.
129. See id.
130. See Bonds, 83 Cal. Rptr. 2d at 788–89.
131. See id. at 788.
132. See id. at 789–90.
133. See id. at 787.
134. Id.
135. See id. at 787.
136. See Bonds, 83 Cal. Rptr. 2d at 788.
137. See id.
waiving their community property rights. Sun was advised by Barry's attorneys that they only represented Barry and she may want to seek independent counsel.

The prenuptial agreement provided the earnings of each spouse during the marriage would remain the separate property of that spouse. Any property acquired with such earnings would also be the separate property of that spouse. The day before Barry and Sun's Las Vegas wedding, the couple—along with a friend of Sun's—met with Barry's attorneys for a few hours. During the meeting, Barry and Sun were given copies of the premarital agreement for the first time. Although, no affirmative declarations were made to Sun that she should seek counsel, the attorneys told "her that 'she may want to [seek independent counsel]." The attorneys reiterated they only represented Barry.

Both parties testified Sun did not want a lawyer at the time of the signing. Sun felt she did not need legal counsel because she had no assets and because she believed the attorneys were assisting both her and Barry. However, Sun also testified she did not understand the nature of the attorney-client relationship, and thus did not realize the importance of being represented by her own attorney.

After the parties read the agreement, Megwa explained the agreement to them line by line. Despite the fact that Sun's native language was Swedish, Megwa felt Sun fully understood the agreement because she never indicated she had any trouble understanding English. Megwa specifically remembered telling the parties the earnings of each spouse would remain separate property. Both parties testified Megwa did in fact explain this.

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138. See id.
139. Id.
140. See id.
141. See id. at 789.
142. See 83 Cal. Rptr. 2d at 789.
143. See id. at 788.
144. See id.
145. Id.
146. See id.
147. See id.
148. See 83 Cal. Rptr. 2d at 788.
149. See id.
150. See id. at 789.
151. See id.
152. See id.
153. See id.
The agreement had numerous errors. Although both parties signed the agreement, Brown failed to attest that he was the attorney for Barry. The agreement referred to an attached list of the parties' separate property, but no list was attached. Further, the agreement had a choice-of-law clause, but failed to specify which state's law was to apply. Sun maintained the attorneys told her and Barry that Arizona law would apply. Finally, the agreement also contained a provision relating to child support, which is void as against public policy in Arizona.

After the Bonds married, Sun did not work outside of the house. The couple had two children together. Although Barry and Sun briefly separated in January 1989, during which time Barry then filed for divorce, the couple soon reconciled. Then, on May 27, 1994, Barry filed a petition for legal separation in California, the state in which Barry and Sun then resided. In response, Sun requested child custody, spousal support, attorneys' fees and a determination of her property rights. At the time of the separation proceeding, Barry was earning $8 million a year.

Barry's petition for legal separation was later converted into one for divorce on December 8, 1994. The parties stipulated to bifurcation of the trial and to the determination of the prenuptial agreement's validity prior to deciding the issues of child custody, spousal support, attorneys' fees and the parties' respective property rights.

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154. See 83 Cal. Rptr. 2d at 788. There were typographical errors, the pages were not numbered and the parties failed to initial every page despite the agreement's express requirement that they do so. See id.
155. See id.
156. See id. at 789.
157. See id. at 791.
158. See id.
159. See id. A provision that relates to child support is void against public policy, and thus illegal. See supra note 53 and accompanying text.
160. See Bonds, 83 Cal. Rptr. 2d at 789.
161. See id.
162. See id.
163. See id.
164. See id.
165. See id.
166. See Bonds, 83 Cal. Rptr. 2d at 789.
167. See id.
168. See id. at 790.
B. Superior Court Decision

As a preliminary matter, the trial court held Arizona law applied to the substantive issues of the Bonds' prenuptial agreement, while California law applied to the procedural issues. The court, however, neglected to explain the reasoning behind this holding. The likely reason for the dichotomy is the choice of law default rules require the laws of the state in which an agreement is signed—here, Arizona—to apply to the substantive issues relating to the agreement. However, courts generally apply the laws of the state in which the parties reside—here, California—to the procedural issues of a dispute.

As to the substantive issues, the court looked to the following factors: whether the agreement was free of fraud, coercion or undue influence; whether Sun entered the agreement with full knowledge of the property involved, her rights therein and the rights relinquished in executing the agreement; whether the agreement and its procurement was fair and equitable; and whether the agreement constituted a contract of adhesion.

The court held the agreement and its execution were free from fraud, coercion and undue influence. This holding was based on the following factual findings: "[Sun] was not forced to [sign] the document;" she was not threatened in any way; "[she] never questioned signing the agreement;" and refusal to sign the agreement would have caused little

169. Bonds v. Bonds (In re Marriage of Bonds), No. 019162, slip op. 2194, 2200 (Cal. Super. Ct., San Mateo County July 20, 1995) (on file with the Loyola of Los Angeles Entertainment Law Review), rev'd, 83 Cal. Rptr. 2d at 783 (Ct. App. 1999), cert. granted, 981 P.2d 40 (Cal. 1999). The procedural issues of the case concern the manner in which the action proceeds. See BLACK'S LAW DICTIONARY 1221 (7th ed. 1999). The substantive issues relate to the rights and duties of the parties in a dispute. See id. at 1443. Thus, the validity of the prenuptial agreement was a substantive issue because it defined Barry's and Sun's property rights. See id.

170. See Bonds, No. 019162, slip op. at 2200.

171. See Bonds, 83 Cal. Rptr. 2d at 789.

172. See id.

173. See generally id. As the applicable Arizona law on antenuptial agreements is exactly the same as the court applied, it is clear the court applied Arizona law without explicitly saying so. See Hess v. Hess (In re Marriage of Hess), No. 1 CA-CV 91-0233, 1 CA-CV 92-0185, 1993 Ariz. App. LEXIS 244, at *13–14, *17, *21 (Ariz. Ct. App. Nov. 4, 1993) (citing the applicable Arizona law for prenuptial agreements signed in 1987); Bonds, No. 019162, slip op. at 2196–99.

174. See Bonds, No. 019162, slip op. at 2196.

175. Id.

176. See id.

177. Id.
embarrassment to her because the wedding was small and could have been easily postponed.\footnote{See id.}

Additionally, the court held Sun executed the agreement knowingly and voluntarily, finding she had known about the assets Barry possessed and had understood his “present and future earnings would remain his separate property” under the agreement.\footnote{Id. at 2197.} Although English was not Sun’s native language, the court found her to be intelligent and capable of understanding the discussions by the attorneys regarding the terms of the agreement and their potential impact on her and Barry.\footnote{See Bonds, No. 019162, slip op. at 2196.}

The court also ruled Sun had adequate knowledge of the property involved in the agreement, her rights in that property “and how the agreement adversely affected those rights.”\footnote{Id. at 2197-98.} The court found Barry gave Sun full disclosure of the nature, approximate value and extent of all of his assets, and Sun had been afforded sufficient time to read the agreement prior to executing it.\footnote{See id. at 2198.} Moreover, the court found it persuasive that Sun never stated she failed to understand the agreement or any explanations given to her regarding the agreement before signing it.\footnote{See id.}

In addition, as Barry’s attorneys had advised her one week before executing the agreement that she could seek separate counsel, the court found Sun had adequate and reasonable opportunity to consult with independent counsel prior to executing the agreement.\footnote{See id.} The court noted during the meeting in which Sun signed the agreement, she declined two separate suggestions by Barry’s attorneys that she may want to retain separate counsel.\footnote{See id.}

Finally, the court ruled the agreement was fair and equitable in terms of its substance, its execution and its results.\footnote{See Bonds, No. 019162, slip op. at 2198.} The court observed Sun had very few assets, while Barry had a lucrative future in baseball.\footnote{See id.} Barry had a right to execute an agreement to protect his present and future earnings.\footnote{See id.} Sun “received substantial benefit” from signing the agreement because “[she] lived an opulent lifestyle” during their marriage which she

\begin{footnotes}
\item[178.] See id.
\item[179.] Id.
\item[180.] See Bonds, No. 019162, slip op. at 2196.
\item[181.] Id. at 2197.
\item[182.] See id.
\item[183.] See id.
\item[184.] See id. at 2197–98.
\item[185.] See id.
\item[186.] See Bonds, No. 019162, slip op. at 2198.
\item[187.] See id.
\item[188.] See id.
\end{footnotes}
otherwise would not have enjoyed.\textsuperscript{189} Further, given Barry's income, the court speculated Sun would probably continue to benefit from child support for many years.\textsuperscript{190} Thus, because the court found nothing in the record indicating the agreement or its execution was "contrary to good morals and law,"\textsuperscript{191} the agreement was deemed fair and equitable.\textsuperscript{192}

The trial court held the prenuptial agreement was valid under Arizona law, and awarded Sun child custody, child support and spousal support.\textsuperscript{193} Sun appealed the court's decision to enforce the prenuptial agreement.\textsuperscript{194}

\textbf{C. The California Court of Appeal's Decision}

1. Choice of Law

The first issue before the California Court of Appeal was whether the trial court's choice of law rulings were erroneous.\textsuperscript{195} The court found that a conflict of laws issue existed because, though the agreement was signed in Arizona, the parties resided and filed the case in California.\textsuperscript{196} Further, the choice-of-law clause in the Bonds' prenuptial agreement was silent as to which state law to apply.\textsuperscript{197} Although neither party had challenged the district court's application of Arizona law, the California Court of Appeal asked both parties to submit supplemental briefs on the issue.\textsuperscript{198} Because Arizona law was more favorable to her, Sun argued Arizona law should apply, whereas Barry contended California's more prenuptial-friendly law should apply.\textsuperscript{199}

The choice of law issue was critical because it determined which party had the burden of proof and which test would apply to determine the validity of the agreement.\textsuperscript{200} Under California law, Sun would have the burden of proof as the challenger of the prenuptial agreement.\textsuperscript{201} However,

\textsuperscript{189} Id.
\textsuperscript{190} See id. at 2198–99.
\textsuperscript{191} Id. at 2198.
\textsuperscript{192} See Bonds, No. 019162, slip op. at 2198.
\textsuperscript{193} See Bonds, 83 Cal. Rptr. 2d at 812.
\textsuperscript{194} See id. at 790. Sun also appealed the court ordered duration of spousal support. See id.
\textsuperscript{195} See Bonds, 83 Cal. Rptr. 2d at 790.
\textsuperscript{196} See id. at 789–90.
\textsuperscript{197} See id. at 789.
\textsuperscript{198} See id. at 790.
\textsuperscript{199} See id.
\textsuperscript{200} See id. at 790–91.
\textsuperscript{201} See Bonds, 83 Cal. Rptr. 2d at 790.
under Arizona law, Barry would bear the burden of proof as the proponent of the prenuptial agreement.\(^{202}\)

The choice-of-law clause also played an important role in the validity of the prenuptial agreement. Before the UPAA was passed, Arizona law required the agreement be “fair and equitable.”\(^ {203}\) On the other hand, California law only required there be full disclosure of all assets prior to execution of the agreement in order to find the agreement valid.\(^ {204}\) The procedural requirements for a prenuptial agreement at the time were similar in both states. California required an agreement be entered into voluntarily, while Arizona required an agreement be free from fraud, coercion and undue influence.\(^ {205}\)

The appellate court concluded the trial court should have applied California law, even if the parties had intended for Arizona law to apply.\(^ {206}\) The court looked to the UPAA to determine whether the choice-of-law clause was legal in California.\(^ {207}\) The relevant provision provided the parties to a premarital agreement could contract as to choice of law governing the construction of the agreement.\(^ {208}\) The court found the UPAA drafters clearly distinguished between construction of an agreement on the one hand, and the validity and enforcement of an agreement on the other.\(^ {209}\) As a result, the court reasoned California’s UPAA did not intend to allow parties to premarital agreements to contract as to choice of law regarding enforcement of the agreement.\(^ {210}\)

The court also held public policy dictated the application of California law.\(^ {211}\) The court looked to the prefatory statement written by the UPAA drafters, which provided the UPAA’s goals were uniformity and certainty of treatment of premarital agreements.\(^ {212}\) Because Arizona’s pre-UPAA laws would have applied to the Bonds’ agreement, the court felt California’s UPAA should have been applied so as not to undermine the UPAA’s goals by applying non-UPAA law.\(^ {213}\) Therefore, the court found

\(^ {202}\) See id. at 791.

\(^ {203}\) Id.

\(^ {204}\) See id. at 790–791.

\(^ {205}\) See id.

\(^ {206}\) See id. at 791.

\(^ {207}\) See Bonds, 83 Cal. Rptr. 2d at 791.

\(^ {208}\) See id.

\(^ {209}\) See id. at 791–92.

\(^ {210}\) See id.

\(^ {211}\) See id. at 792.

\(^ {212}\) See id.

\(^ {213}\) See Bonds, 83 Cal. Rptr. 2d at 791. The prenuptial agreement was signed in 1987, four years before Arizona enacted a form of the UPAA. See id. at 790.
the trial court erred in applying Arizona law to determine the validity of the agreement.\textsuperscript{214}

2. Validity of the Prenuptial Agreement

a. Unconscionability and Disclosure of Assets

The California Court of Appeal proceeded to analyze the validity of the prenuptial agreement by applying California's version of the UPAA.\textsuperscript{215} Pursuant to California Family Code section 1615, a prenuptial agreement must be entered into voluntarily and must either be free from unconscionability when executed, or be executed subsequent to a full disclosure of the spouse's assets.\textsuperscript{216}

In applying the statute to the Bonds case, the court found there was substantial evidence to support the trial court's finding that Sun had adequate knowledge of Barry's property and financial obligations when signing the agreement.\textsuperscript{217} Despite the parties' failure to attach property schedules to the agreement, the court found a handwritten list of the assets, presented and available during the meeting at the attorneys' office, was adequate.\textsuperscript{218} Further, the court credited Brown's testimony that he believed both Barry and Sun were aware of one another's assets.\textsuperscript{219} Although Sun complained about the failure to attach the proper schedules, the court noted Sun's inability to identify any assets or debts Barry had hidden from her.\textsuperscript{220} Consequently, the appellate court agreed with the trial court's finding of adequate disclosure.\textsuperscript{221} Thus, under California law, once the disclosure requirement was satisfied, the court had no need to reach the issue of unconscionability.\textsuperscript{222}

b. Voluntariness

The only remaining issue concerning the validity of the Bonds' premarital agreement was whether it satisfied the voluntariness requirement

\textsuperscript{214} See id. at 792.
\textsuperscript{215} See id. at 798.
\textsuperscript{216} See CAL. FAM. CODE § 1615 (West 1994).
\textsuperscript{217} See Bonds, 83 Cal. Rptr. 2d at 798.
\textsuperscript{218} See id.
\textsuperscript{219} See id.
\textsuperscript{220} See id.
\textsuperscript{221} See id.
\textsuperscript{222} See generally CAL. FAM. CODE § 1615.
of the California UPAA.\textsuperscript{223} The trial court, applying Arizona law, had found Sun knowingly and voluntarily signed the agreement.\textsuperscript{224} However, the California Court of Appeal held the trial court failed to properly weigh Sun's lack of independent legal representation in its voluntariness determination.\textsuperscript{225} Consequently, the appellate court reversed the trial court's holding.\textsuperscript{226}

In deciding how much weight independent legal representation for both parties should have on the enforceability of a prenuptial agreement, the court looked to the historical ambivalence toward prenuptial agreements and how the principles of fundamental fairness played a role in that history.\textsuperscript{227} The court concluded the common law requires prenuptial agreements to be substantively and procedurally fair as a direct result of this history.\textsuperscript{228}

The court initially looked at how other jurisdictions had dealt with the "substantive unfairness" analysis.\textsuperscript{229} The court criticized other courts' treatment of prenuptial agreements as ordinary contracts and articulated several reasons why the agreements merit heightened scrutiny.\textsuperscript{230} First, the court noted because women earn less money than men on the whole, they could be further disadvantaged by waiving their community property rights.\textsuperscript{231} Second, the court emphasized the special legal status of marriage connotes a relationship of trust and confidence distinct from that of most other contracting parties.\textsuperscript{232} Additionally, the court acknowledged the parties' potential lack of understanding of the economic rights being waived.\textsuperscript{233} The court determined these findings required closer scrutiny when examining prenuptial agreements.\textsuperscript{234} However, the court felt a heightened substantive fairness review would conflict with the UPAA's

\textsuperscript{223} See Bonds, 83 Cal. Rptr. 2d at 798.
\textsuperscript{224} Id.
\textsuperscript{225} See id. at 799, 809.
\textsuperscript{226} See id.
\textsuperscript{227} See id. at 794–97.
\textsuperscript{228} See id.
\textsuperscript{229} Bonds, 83 Cal. Rptr. 2d at 795.
\textsuperscript{230} See id. at 795–96. Ordinary contracts do not generally receive close scrutiny. See id.
\textsuperscript{231} See id. at 795.
\textsuperscript{232} See id. at 796. The court felt there was also a strong state interest in closely regulating prenuptial agreements because they are substantially different from commercial contracts. See id. Contracts for the "sale of a hundred pounds of... beans" are not quite the same as contracts regarding marital relationships. Id. (quoting a drafter from an August 3, 1982, proceeding of the National Conference of Commissioners on Uniform State Laws).
\textsuperscript{233} See id.
\textsuperscript{234} See id.
policy of encouraging the enforceability of prenuptial agreements. 235 As a result, the court found closer scrutiny of substantive fairness review was not an appropriate means of protecting parties’ interests. 236

The court of appeal then analyzed how to implement the heightened scrutiny review of procedural fairness with regard to prenuptial agreements. 237 The court found the best way to ensure procedural fairness in the execution of a prenuptial agreement was for both parties to secure independent legal counsel. 238

The court noted closer scrutiny is applied in the context of postmarital settlement agreements where the parties did not have equal access to attorneys. 239 The court was concerned that applying a different standard for premarital agreements “would contravene California’s public policy of discouraging marital property settlements that violate notions of fundamental fairness.” 240 Additionally, the court observed other jurisdictions apply a heightened scrutiny only where one party to a prenuptial agreement had legal counsel. 241 Further, the court noted absence of independent legal counsel is a factor in determining the enforceability of an agreement under the UPAA. 242 Finally, the court, citing California legal

235. See Bonds, 83 Cal. Rptr. 2d at 796.
236. See id.
237. See id. at 796–97.
238. See id. at 797.
239. See id. at 799. Postmarital agreements are agreements executed by spouses after the marriage has been entered into in order to specify the division of property in case of divorce or death. See Graham, supra note 44, at 1038.
240. Bonds, 83 Cal. Rptr. 2d at 799.
241. See id. at 800. The court cited four cases where strict scrutiny was applied due to one party’s lack of independent legal representation: Lutz v. Schneider (In re Estate of Lutz), 563 N.W.2d 90, 95–101 (N.D. 1997) (noting “lack of adequate legal advice to a prospective spouse to obtain independent counsel is a significant factual factor in weighing voluntariness of premarital agreements”); Fletcher v. Fletcher, 628 N.E.2d 1343, 1346–47 (Ohio 1994) (holding the burden of proof shifts to the party claiming validity of the agreement where the other party has no meaningful opportunity to consult with independent counsel and where the agreement provides disproportionately less property to the underrepresented party); Foran v. Foran (In re Marriage of Foran), 834 P.2d 1081, 1088 n.10 (Wash. Ct. App. 1992) (holding a prenuptial agreement was invalid when the wife, not represented by counsel, signed the agreement a day before the parties’ departure for their wedding trip); Gant v. Gant, 329 S.E.2d 106, 116 (W. Va. 1985) (stating “independent advice is not a prerequisite to enforceability when the terms of an agreement are understandable to a reasonably intelligent adult, as long as both parties had the opportunity to consult with independent legal counsel”).
242. See Bonds, 83 Cal. Rptr. 2d at 801–02. The comment to section 6 of the UPAA states the absence of legal counsel is a factor in determining whether to enforce a prenuptial agreement. See UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9B U.L.A. 376 (1997). The court noted a previous draft of the UPAA made legal counsel a requirement, but this was ultimately omitted because the drafters believed that the rights of people should not depend upon whether they have lawyers. See Bonds, 83 Cal. Rptr. 2d at 802.
practice guides on family law, warned attorneys it may be unethical for one attorney to represent two parties with conflicting interests.  

For these reasons, the court required heightened scrutiny in situations where one party signing the prenuptial agreement has legal representation, while the other party both waives his or her statutory rights without having consulted separate legal counsel and does not possess legal skills or business acumen.  

Because Sun did not have independent legal counsel prior to executing the contract, the appellate court held the trial court should have applied heightened scrutiny to the voluntariness analysis of the Bonds agreement.  

As a result, the court reversed the trial court’s decision and remanded the case for further proceedings consistent with the newly created standard.

C. Current Status of the Bonds’ Case

After the appellate court reversed and remanded the trial court’s decision, Barry Bonds appealed the case to the California Supreme Court. The California Supreme Court granted review of the case on July 21, 1999.

V. THE MISTAKES OF THE CALIFORNIA COURT OF APPEAL

A. Choice-of-Law Clause

Although the choice-of-law clause in the Bonds’ prenuptial agreement was incomplete and ambiguous, the appellate court should have used

243. See Bonds, 83 Cal. Rptr. 2d at 803–04. The court noted that California’s practice guides have alerted practitioners for many years about the danger of a reviewing court refusing to enforce an agreement where: only one party is represented; where there was no signature by that unrepresented party; the parties did not understand the potential conflict of interest; or there was no written recommendation for that party to seek independent legal counsel. See id. The American Law Institute (“ALI”)–American Bar Association Continuing Legal Education practice guide advises if one party has an attorney and that attorney does not insist on the other party having independent legal counsel, the attorney is probably committing malpractice. See id. at 804 n.8. The ALI recommends, in order to help ensure the chances of the agreement being upheld, attorneys should refuse to represent parties on opposite sides of a prenuptial agreement. See id.

244. See id. at 797.

245. See id. at 809.

246. See id. at 815.


248. See id.

contract interpretation rules to construct the meaning of the clause. California law requires courts interpret a prenuptial agreement so as to give effect to the two parties' mutual intent. The court is also permitted to use extrinsic evidence to help interpret ambiguous terms.

Sun testified the attorneys informed the couple that Arizona law would apply to their agreement. It is a logical inference that this was Barry's intention because Arizona was the state in which the prenuptial agreement was signed and the state in which Barry and Sun resided. The record also reflects no significant contacts with any other state at the time in which the agreement was executed. Thus, if that was in fact Barry's intention, it is highly unlikely his attorneys would draft the prenuptial agreement in a manner contrary to that intention. Furthermore, it is reasonable to infer Sun also intended for Arizona law to apply because nothing in the record indicates she objected when Barry's attorneys allegedly stated Arizona law would apply.

Even if the attorneys did not tell Sun and Barry that Arizona law would apply, however, California law dictates ambiguous choice-of-law clauses be interpreted against the drafter of the contract where contract interpretation rules fail to clarify the clause. Because Sun desired Arizona law to apply and Barry was responsible for the drafting of the agreement, the court should have interpreted this ambiguous clause against Barry by applying Sun's choice of law, Arizona.

In determining whether the trial court's choice of law was correct, the appellate court improperly disregarded the agreement's choice-of-law clause by basing its decision on section 1612(a)(6) of California's UPAA and the section's legislative history. This section provides parties to a prenuptial agreement can contract as to choice of law concerning the construction of the agreement. As the court noted, the section's legislative history distinguishes contract construction from contract

250. See CAL. CIV. CODE § 1636 (West 1985).
251. See Powers v. Dickson, 63 Cal. Rptr. 2d 261, 266 (Ct. App. 1997).
252. See Bonds, 83 Cal. Rptr. 2d at 791.
253. See id. at 787-89.
254. See id.
255. See id. at 791.
256. See Powers, 63 Cal. Rptr. 2d at 266-67 (quoting CAL. CIV. CODE § 1654 (West 1985)).
257. See Bonds, 83 Cal. Rptr. 2d at 790.
258. See supra note 256 and accompanying text.
259. See Bonds, 83 Cal. Rptr. 2d at 791-92.
enforcement and/or validity.\textsuperscript{261} The court reasoned because section 1612(a)(6) only permitted choice-of-law clauses regarding the construction of an agreement and because this case dealt with the validity of the agreement, the parties could not use a choice-of-law clause to resolve this issue.\textsuperscript{262} Instead, the court should have referred to section 1612(a)(7) of the UPAA, allowing parties to a prenuptial agreement to freely contract as to any matter, as long as the provisions do not violate public policy or criminal statutes.\textsuperscript{263} By making the two sections contiguous, the drafters probably intended the sections to be complimentary.

The court appropriately disregarded the Bonds' choice-of-law clause. However, it failed to employ the correct rationale for doing so. As discussed previously, the court should have used contract interpretation rules to find the parties intended Arizona law to apply to this case. Once this determination was made, the court should have recognized applying the relevant pre-UPAA Arizona law would undermine the UPAA's uniformity goal\textsuperscript{264} as Arizona law required a more stringent standard of enforceability.\textsuperscript{265} Given that the Bonds were California residents at the time of the appellate court decision\textsuperscript{266} and California adopted the UPAA and its uniformity goals, the correct determination was to disregard the choice of Arizona's pre-UPAA law. Nonetheless, the court's reliance on section 1612(a)(6) of the UPAA to justify its determination was an error. As a result, the choice-of-law clause was correctly invalidated, but for the wrong reasons.

After invalidating the choice-of-law clause in the Bonds' prenuptial agreement, the court had to decide whether California or Arizona law should apply in determining the agreement's validity. First, the court should have analyzed whether Arizona had an actual interest in applying its law.\textsuperscript{267} This would allow the court to ascertain whether there was a true conflict between California and Arizona law, thus warranting comparative impairment analysis.\textsuperscript{268}

\textsuperscript{261} See Bonds, 83 Cal. Rptr. 2d at 791.
\textsuperscript{262} See id. at 791–92.
\textsuperscript{263} See CAL. FAM. CODE § 1612(a)(7) (West 1994).
\textsuperscript{264} The intent to promote enforceability and uniformity is found within the actual UPAA passed by the National Conference of Commissioners on State Laws and Proceedings. See UNIF. PREMARITAL AGREEMENT ACT, Prefatory Note, 9B U.L.A. 369 (1987).
\textsuperscript{265} See supra notes 87–91 and accompanying text.
\textsuperscript{266} See Bonds, 83 Cal. Rptr. 2d at 789.
\textsuperscript{268} See supra notes 115–19 and accompanying text.
Arizona’s pre-UPAA law articulated an interest in protecting its divorced spouses. After adopting the UPAA law, however, Arizona’s focus has changed from protecting the challenger of a prenuptial agreement to promoting the enforceability of prenuptial agreements.

On the other hand, California has a strong interest in applying the UPAA and its goals of enforceability and uniform treatment of prenuptial agreements. The law seeks to accomplish these goals by placing the burden of proof on the challenger of the agreement, requiring the party with the burden of proof to show that the agreement was either entered into involuntarily or was unconscionable at the time of execution and executed without full disclosure of the parties’ assets. Further, California has a specific interest in the Bonds’ case because it address the very meaning of voluntariness for purposes of the UPAA, a concept that has not been flushed out by case law thus far.

California’s interest in applying its given laws also stems from its territorial contacts with the parties. The parties currently reside in California, the lawsuit was brought in California, and Barry plays for the San Francisco Giants, a California baseball team.

At first glance, Arizona appears to have an interest in protecting destitute spouses by application of its laws. However, the state’s subsequent UPAA passage eliminates this interest. Thus, Arizona has no interest in applying its preempted law. Conversely, California has multiple interests in applying its UPAA laws. First, the uniformity objective underlying the UPAA is jeopardized. Second, the parties were California residents. Finally, the case would help clarify what constitutes

269. See Hess v. Hess (In re Marriage of Hess), No. 1 CA-CV 91-0233, 1 CA-CV 92-0185, 1993 Ariz. App. LEXIS 244, at *18 (Ariz. Ct. App. Nov. 4, 1993) (noting Arizona sought to protect the destitute spouse). Arizona accomplished its interest by placing the burden of proof on the person arguing for the validity of the agreement. See id. at *13-14, *18, *21. Arizona required the party with the burden to show, by clear and convincing evidence, the agreement was fair, reasonable and not an adhesion contract. Id.


272. See CAL. FAM CODE § 1615 (West 1994).

273. See Comparative Impairment Reformed: Rethinking State Interests in the Conflict of Laws, 95 HARV. L. REV 1079, 1098 (1982) (noting the closer a case resembles a “core” application of a statute, the greater the state’s interest in its application).

274. See id. at 1099 (stating the extent of the parties’ territorial contacts is another factor in policy analysis).

275. See Bonds, 83 Cal. Rptr. 2d at 789; see also Sosa’s New Deal: $42.5 Million, S.F. CHRON., June 28, 1997, at B5.
voluntariness for purposes of the state’s UPAA law. Therefore, the court was therefore correct to apply California law.

In sum, the choice-of-law clause in the Bonds’ agreement was invalidated for the wrong reasons. Although the clause failed to delineate which state’s laws would apply, the court of appeal should have used contract interpretation rules to determine the clause’s intent was to select Arizona law. The court should then have found the clause invalid because Arizona law was inconsistent with California’s public policy interest in the uniform treatment and enforceability of prenuptial agreements instead of finding the clause was invalid because California law prohibits choice-of-law clauses in prenuptial agreements. The court’s subsequent analysis was correct. Arizona had no real interest in applying its old law. Thus, the court properly applied California law.

B. Validity of the Prenuptial Agreement

1. Unconscionability and Failure to Disclose Assets

In its validity analysis, the California Court of Appeal quickly and properly dealt with the California UPAA provisions regarding unconscionability and failure to disclose all assets. These sections provide even where a prenuptial agreement is unconscionable, it will nonetheless be enforced unless the non-drafting party failed to provide “fair and reasonable disclosure of [that party’s] property and financial obligations” to the other party. The record reflects even though an actual schedule of Barry’s and Sun’s assets was not attached to the agreement, both parties knew of each other’s assets and had access to a handwritten list at the attorney’s office on the date of execution. As a result, the court properly concluded Barry fairly and reasonably disclosed all property and financial obligations to Sun.

2. Voluntariness

The appellate court’s greatest weakness lies in its holding regarding voluntariness. By creating a new heightened scrutiny rule for agreements executed without both parties having independent legal counsel, the

276. See Bonds, 83 Cal. Rptr. 2d at 798; CAL. FAM. CODE § 1615(a)(2)(A) (West 1994).
278. See id.
279. See Bonds, 83 Cal. Rptr. 2d at 798.
280. See id.
appellate court exceeded its authority. Further, the court remanded the case to the trial court without instructions as to how to apply the rule to the Bonds. In avoiding this controversial issue to the trial court, the court may have left itself open to much less criticism, but it increased the likelihood of future inconsistent application of California's UPAA laws.

a. Failure to Abide by the Language and Legislative History of the Law

The California Court of Appeal erred in creating a new heightened standard because the standard directly contradicts the language of the UPAA. California's UPAA requires only that a prenuptial agreement be signed voluntarily and it fairly and reasonably disclose the other party's assets. No requirement exists that if one party has counsel, the other must retain counsel as well. Moreover, the language of the statute itself does not in any way allude to the use of heightened scrutiny in the absence of independent legal counsel for both parties.

The court's error may partly lie in its misinterpretation of the intent underlying California's UPAA. The court cited legislative history discussing mandatory independent legal counsel for both parties, but the UPAA drafters ultimately refused to make such a requirement because they felt the rights of parties to an agreement should not be dependent upon whether they retained attorneys. However, by imposing a heightened scrutiny standard on the voluntariness analysis, the court effectively did what the drafters refused to do. It made the validity of a prenuptial agreement heavily dependent on whether both parties had independent legal counsel. The court subordinated the clear intent of the UPAA by making independent legal counsel a nearly de facto requirement instead of considering it a voluntariness factor.

The appellate court's decision contradicts the will of the legislature and violates California Code of Civil Procedure section 1858. That section provides in construing a statute, the duty of the court is "simply to

281. See id. at 812.
282. Prior to this case, heightened scrutiny was not required simply because one party was represented by independent legal counsel. See id. at 816, 819 (Ruvolo, J., concurring and dissenting). Previously, whether both parties had independent counsel was just one factor in determining whether the agreement was signed voluntarily. Id.
285. See id. § 1615.
286. See Bonds, 83 Cal. Rptr. 2d at 802.
287. See id. at 819 (Ruvolo, J., concurring and dissenting).
288. See CAL. CIV. PROC. CODE § 1858 (West 1983).
ascertain and declare what is in terms or substance contained therein, not to insert what has been omitted."289 The court’s decision goes beyond the scope of the judiciary’s power by legislating instead of merely interpreting.290

b. Subversion of the Goals of the UPAA

The court’s new standard also undermines the UPAA’s uniformity and certainty goals by failing to clearly articulate the contours of the new standard.291 While the court states its holding four times, it characterizes the holding differently each time.292 This creates uncertainty as to what exactly is required to ensure a prenuptial agreement is upheld. Furthermore, by failing to apply the new standard, the appellate court relinquished the opportunity to define what facts would satisfy the standard. If the court does not clearly articulate its own holding, lower courts will apply the new standard inconsistently. The combination of poor articulation and few guidelines inserts subjectivity into the new heightened scrutiny standard. Further, it will likely reintroduce the lack of uniformity in applying prenuptial agreement law the UPAA sought to eliminate. Because the ambiguous standard adds another layer of factual scrutiny to the law, the court makes possible the very scenario the UPAA was intended

289. Id.
290. See People v. Rudy L. (In re Rudy L.), 34 Cal. Rptr. 2d 864, 866 (Ct. App. 1994).
291. See Bonds, 83 Cal. Rptr. 2d at 787, 797, 800, 809. See UNIF. PREMARITAL AGREEMENT ACT, Prefatory Note, 9B U.L.A. 369, for a discussion of the goals of the UPAA.
292. See Bonds, 83 Cal. Rptr. 2d at 787, 797, 800, 809. The court first said the standard should apply “when a party challenging a premarital agreement establishes that he or she did not have legal counsel while the other party had such assistance, and the unrepresented party did not have the opportunity to obtain legal counsel or did not knowingly refuse legal counsel . . . .” Id. at 787. The court then phrased the holding as “we conclude that courts must more carefully scrutinize the process when the bargaining relationship is so unequal that only one party has legal representation and the party without legal representation does not have any particular legal skills or business acumen and agrees to forgo his or her statutory rights.” Id. at 797. The court next characterized the standard as “[c]losely scrutinizing the circumstances surrounding the execution of the contract when only one party has legal counsel. . . .” Id. at 800. Thereafter, the court stated “[a]s with settlement agreements in divorce actions, the court should ‘carefully scrutinize the [prenuptial] agreements when the party challenging the agreement did not have the advice of counsel.’” Id. at 809 (quoting Adams v. Adams, 177 P.2d 265, 269 (Cal. 1947)). At one juncture, the court discussed both parties having the opportunity to have counsel or not knowingly refuse legal counsel; at another, it only discusses the unrepresented party’s opportunity. See Bonds, 83 Cal. Rptr. 2d at 787, 797, 800, 809. Similarly, the court does not clearly state whether it is important for the other party to have counsel even if the drafter does not. Id. Furthermore, the court does not sufficiently explain whether the possession of legal and business sophistication should be a factor in every case. Id. The same holds true for the requirement of knowingly refusing counsel. Id.
to remedy, "reflexive response[s] to varying factual circumstances at different times."\(^{293}\)

Moreover, the standard delineated by the court contradicts the UPAA in yet another way. The UPAA standardized the treatment of prenuptial agreements by "emphasizing the freedom of contract [concept] over protection of the economically un-empowered spouse."\(^{294}\) By emphasizing the need for independent legal counsel, the court undermines the UPAA's policy of freedom to contract.

c. Poor Use of Case Law as Justification

The court supported its new standard with a limited number of cases: *In re Marriage of Foran*,\(^{295}\) *Fletcher v. Fletcher*\(^{296}\) and *Gant v. Gant*.\(^{297}\) However, these cases were decided in non-UPAA jurisdictions.\(^{298}\) Consequently, these cases have little relevance to the UPAA-guided analysis applicable to *Bonds*.

Although the court was also guided by UPAA case law, it utilized only one case in support of its decision,\(^{299}\) *In re Estate of Lutz*.\(^{300}\) In *Lutz*, a North Dakota Supreme Court ruled "lack of adequate legal advice to a prospective spouse to obtain independent counsel is a significant factual factor in weighing the voluntariness of a premarital agreement."\(^{301}\) The *Lutz* court correctly found independent legal counsel is a factor courts should consider as part of the voluntariness determination.\(^{302}\) However, *Lutz* does not stand for the idea that heightened scrutiny should apply where a party lacks independent legal counsel.\(^{303}\) In addition, the *Bonds* court explicitly changed the *Lutz* court's characterization of the

\(^{293}\) UNIF. PREMARRITAL AGREEMENT ACT, Prefatory Note, 9B U.L.A. 369.

\(^{294}\) Brandt, supra note 61, at 543.


\(^{296}\) 628 N.E.2d 1343 (Ohio 1994).

\(^{297}\) 329 S.E.2d 106 (W. Va. 1985).

\(^{298}\) *Foran, Fletcher, and Gant* involved respectively Washington, Ohio, and West Virginia. See *Foran*, 834 P.2d 1081; *Fletcher*, 628 N.E.2d 1343; *Gant*, 329 S.E.2d 106. None of these states has passed the UPAA. See UNIF. PREMARRITAL AGREEMENT ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 9B U.L.A. 83.

\(^{299}\) See *Bonds*, 83 Cal. Rptr. 2d at 819 n.7 (Ruvolo, J., concurring and dissenting).

\(^{300}\) Lutz v. Schneider (*In re Estate of Lutz*), 563 N.W.2d 90 (N.D. 1997).

\(^{301}\) *Lutz*, 563 N.W.2d at 98.

\(^{302}\) See supra note 287 and accompanying text.

\(^{303}\) See *Lutz*, 563 N.W.2d at 98–99. The *Lutz* court stated directly before its holding that "lack of opportunity to consult with independent counsel may be a factor in a fiduciary relationship." *Id.* at 98. This suggests the court did not desire to give legal counsel as much weight as the court in *Bonds*. 
independent legal counsel factor from "significant," to "especially significant." In sum, the California Court of Appeal stretched the language in *Lutz* beyond its reasonable interpretation in order to support its imposition of a heightened scrutiny standard.

d. The *Bonds* Court Improperly Usurped the Legislature’s Powers

The *Bonds* court extensively discussed the policies favoring use of strict scrutiny: the lack of economic parity between men and women, women’s tendency to have greater responsibilities at home and women’s proclivity to be the disadvantaged party in prenuptial agreements. Society should address these legitimate concerns. However, it is inappropriate for a court to question the wisdom of the legislature. The legislature’s duty is to weigh public policy and enact laws to ameliorate societal problems. By contrast, the judiciary primarily interprets the law. Thus, the *Bonds* court’s creation of a standard absent from the California UPAA usurps the legislature’s delegated power and thereby subverts the will of the people.

In conclusion, the new standard of voluntariness review of prenuptial agreements fails to abide by the language and legislative history of the California UPAA. The California Court of Appeal undermines the explicit goals of the UPAA by creating this new standard. Further, the court over-reaches its power by usurping the role of the legislature.

304. *Lutz*, 563 N.W.2d at 98.
305. *Bonds*, 83 Cal. Rptr. 2d at 800.
306. See id. at 795.
309. See id.
311. As Alexander M. Bickel wrote:
   The root difficulty is that judicial review is a counter-majoritarian force in our system. There are various ways of sliding over this ineluctable reality... obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it... it is the reason the charge can be made that judicial review is undemocratic.
312. See supra Part V.B.2.a.
313. See supra Part V.B.2.b.
314. See supra Part V.B.2.d.
result, the California Court of Appeal’s decision in *In re Marriage of Bonds* is flawed and should be overturned.

VI. PROPOSAL

As discussed above, the California Court of Appeal’s decision in *Bonds* is flawed.\(^{315}\) However, desiring all parties involved in prenuptial agreements to have independent legal counsel was not one of them. Rather than judicially amending the California UPAA’s application, the court should have restricted itself to suggesting the legislature amend the law to make independent legal counsel a requirement.

Requiring independent legal counsel for both parties to a prenuptial agreement has been advocated in the past.\(^{316}\) One rationale for requiring independent counsel is without it, a party might not consider the possibility of circumstances changing during the marriage and the effects a prenuptial agreement could have on these changes.\(^{317}\) This is especially true for spouses of athletes, who may not envision their athlete spouses spending so much time away from them, and leaving them with the sole responsibility of caring for children and the home. These spouses might change their opinion about whether they should waive their statutory community property rights with a prenuptial agreement in light of these possibilities.

In addition, people in love are not as likely to be as objective and critical as they would be otherwise.\(^{318}\) The premarital context can cloud a person’s ability to fully understand the ramifications of waiving his or her statutory rights.\(^{319}\)

In light of these problems, the National Conference of Commissioners on Uniform Laws should amend the UPAA to require independent legal counsel for both parties. The amendment should provide if the non-drafting party cannot afford an attorney, the party proposing the agreement should pay for the services. If a party has assets valuable enough to inspire the drafting of a prenuptial agreement, then that party can likely afford to pay for the other party’s counsel. It also serves the interests of the wealthier party to pay for good counsel because it helps ensure the party signing the agreement does so knowingly, thereby strengthening the validity of the agreement.

\(^{315}\) See *supra* Part V.

\(^{316}\) See *Marston*, *supra* note 9, at 913.

\(^{317}\) See *id.* at 914.

\(^{318}\) See *id.* at 911.

\(^{319}\) See *id.* at 913.
VII. CONCLUSION

Prenuptial agreements have taken on many of the very same characteristics that other contracts generally possess because of the Uniform Pre marital Agreement Act’s passage. The UPAA’s increased certainty of enforceability of prenuptial agreements has made them more attractive to athletes like Barry Bonds. However, that attraction will be short lived if the California Supreme Court does not reverse the California Court of Appeal’s misguided decision in the Barry Bonds case.

First, the California Supreme Court must recognize the appellate court erred in not interpreting the Bonds’ choice-of-law clause, a particularly important provision in athletes’ contracts. The appellate court discounted the clause as invalid because it dealt with the enforceability of a prenuptial agreement. However, the clause should have been disregarded for another reason, Arizona’s pre-UPAA laws, which the parties likely intended to apply, violate important California public policies. The court correctly ruled Arizona had no interest in applying its revoked common law to this case. Thus, the court correctly applied California law to the case.

Second, although the court made numerous mistakes, the most egregious error was the imposition of heightened scrutiny to the prenuptial agreement analysis where only one party had independent legal counsel prior to execution and the other party did not have sufficient business or legal skills. The court created this new standard even though it contradicts the UPAA, conflicts with the UPAA’s legislative history and applicable case law, and subverts the UPAA’s goals. In sum, the court usurped the powers of the legislature by creating a new heightened standard. As one critic put it, the court came to its own conclusion and then shaped the law accordingly.320

Nevertheless, the appellate court in Bonds tried to achieve a legitimate goal of requiring independent legal counsel for both parties entering into prenuptial agreements. The court wisely recognized parties blinded by love are often unable to foresee the ultimate ramifications of the agreement should circumstances change, as they often do in the marriages of traveling professional athletes.

Nonetheless, instead of engaging in judicial legislation, the California Court of Appeal should have limited itself to strongly suggesting that the legislature amend the UPAA. Because it did not so limit itself, the

California Supreme Court should overturn the appellate court’s decision and bring certainty and enforceability back to prenuptial agreements so professional athletes can once again rely on them to protect their assets.

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* I would like to thank all of the editors and staff at Loyola of Los Angeles Law School Entertainment Law Review for their hard work, personal time and assistance, in particular, Lynne Kniss, Ivy Choderker, David Norrell, Greg Akselrud and Tamra Boyer Kaufman. An immense thank you to Shannon Hensley for her countless hours of hard work and suggestions. Thank you Professor Edith Friedler and Charlotte Goldberg for your time and guidance. I would like to thank Boris Reznikov, Leon Schwartzman, Talya Friedman, Steve Kroll, Josh Vinograd, John Lord, Aida Darakjian and the rest of my friends for all their support. I extend a special thanks to Alex Naroditsky for helping me realize the value of this feat. This article is dedicated to my parents for their love, encouragement and decision to have me even though their doctors told them otherwise; to my sister, Ellen, for her undying love; and my grandparents. I wish some of them could see the day; this is their accomplishment, not mine. In the words of Vince Lombardi, “Football is a great deal like life in that it teaches that work, sacrifice, perseverance, competitive drive, selflessness and respect for authority is the price each and every one of us must pay to achieve any goal that is worthwhile.” This Note is proof that Vince Lombardi’s elements of success apply to anything one does in life.