UNDER *FELLOWS DOES* SENATE BILL 78 RETROACTIVELY INVALIDATE PREMARITAL AGREEMENTS SIGNED WITHOUT INDEPENDENT COUNSEL?

BY RONALD S. GRANBERG, CFLS

PART ONE: EFFECT OF SENATE BILL 78 ON PROPERTY LIMITATION PROVISIONS

1. INTRODUCTION

Throughout California history, fiancés have been able to enter into a valid premarital agreement with each other without the necessity of each fiancé's being represented by a separate lawyer. That ability disappeared on January 1, 2002, when Senate Bill 78 added Family Code[1] subdivisions 1612(c) and 1615(c).

(For convenience, this article nicknames "the Counsel Requirement" the rules set forth in Subdivisions 1612(c)[2] and 1615(c)[3] that a premarital agreement is not enforceable against a fiancé who wasn't represented by independent legal counsel when s/he signed the agreement.)

This article discusses whether, in light of *In re Marriage of Fellows* (2006) 39 Cal.4th 179, failure to satisfy the Counsel Requirement retroactively invalidates property limitation provisions and/or spousal support limitation provisions in a pre-2002 premarital

agreement. (The issues of whether Subdivision 1612(c)'s new unconscionability test[4] and/or Subdivision 1615(c)(2)'s new seven-day requirement[5] should be given retroactive application are beyond the scope of this article.)

Discussion of these issues is divided into two parts.

- This "Part One" presents the hypothetical fact pattern and analyzes the validity of property limitation provisions in pre-2002 premarital agreements not satisfying the Counsel Requirement.
- "Part Two" (below) analyzes the validity of spousal support limitation provisions in pre-2002 premarital agreements not satisfying the Counsel Requirement.

2. CAROL COVENANT'S DILEMMA

A. 1999: AN AGREEMENT IS BORN

Carol Covenant had a high income and substantial assets when she fell in love with Robert Regret, a certified family law specialist with a low income and few assets.

Covenant retained you in 1999 to draft a premarital agreement ("the Agreement") well in advance of her and Regret's wedding date. She hired you because you had represented her ("brilliantly," to quote Covenant) in her prior bitter divorce.

The Agreement benefited Covenant

1. Unless otherwise stated, statutory references are to the Family Code.
2. Subdivision 1612(c) provides, in pertinent part: "Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed . . . "
3. Subdivision 1615(c)(1) provides, in pertinent part: "For the purposes of subdivision (a) [premarital agreement not enforceable unless party against whom enforcement is sought executed it voluntarily] it shall be deemed that a premarital agreement was not executed voluntarily unless . . . . [¶] The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the agreement . . . . " At first glance, Subdivision 1615(c)(3) seems to offer an alternative to this Subdivision 1615(c)(1) Counsel Requirement, because under Subdivision 1615(c)(3) there is no Counsel Requirement regarding a fiancé who has been "fully informed of . . . the rights and obligations he or she was giving up by signing the agreement. . . . *** The explanation of the rights and obligations relinquished shall be memorialized in writing and delivered to the party prior to signing the agreement." Upon reflection, it is clear that the Subdivision 1615(c)(3) procedure is no viable alternative to the Subdivision 1615(c)(1) Counsel Requirement, since no prudent premarital agreement drafter would rely on being able to prove that a signatory had been in possession of "full information" regarding waived rights. Furthermore, who except the fiancé's "independent legal counsel" would provide the fiancé such "full information"?
4. Prior to Senate Bill 78, unconscionability for all premarital agreement purposes was measured as of date of the agreement's execution (Fam. Code §1615(a)(2)). Senate Bill 78 required unconscionability for purposes of spousal support limitation provisions to be measured as of date of the agreement's enforcement (Fam. Code §1615(c)).
5. Subdivision 1615(c)(2) provides, in pertinent part: "For the purposes of subdivision (a) [premarital agreement not enforceable unless party against whom enforcement is sought executed it voluntarily] it shall be deemed that a premarital agreement was not executed voluntarily unless . . . . [¶] The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.

with:

- A provision ("the Property Limitation Provision") that reduced the amount of property that Regret would receive in a divorce, and
- A provision ("the Spousal Support Limitation Provision") that reduced the amount of spousal support that Regret would receive in a divorce.

You mailed Regret a draft of the Agreement accompanied by a letter explaining that you represented Covenant only, strongly advising Regret to have the draft reviewed by an attorney of his choice, and requesting Regret's attorney inform you of any desired modifications to the draft.

A few days later, Covenant informed you that Regret had adamantly refused to have the Agreement reviewed by an independent attorney but that he was mailing you a list of five revisions he wanted incorporated into the Agreement.

When you received Regret's list, you saw that each of the five revisions substantially benefited him: three revisions softened the Property Limitation Provision and two revisions softened the Spousal Support Limitation Provision.

Although you warned Covenant that the five revisions greatly reduced the Agreement's benefit to her, she instructed you to incorporate all five into the Agreement. You did so.

You advised Covenant that, if Regret's reluctance to obtain advice of independent counsel was because Regret was short on funds, she should offer to reimburse Regret whatever attorney's fees he incurred. Covenant made that offer to Regret, but he held firm in his refusal to have the Agreement reviewed by a lawyer.

Covenant asked you whether it were a legal requirement that Regret obtain independent legal advice about the Agreement. You told her that it wasn't.

Covenant told you that her repeated suggestions that Regret hire a lawyer were putting a strain on their relationship. Covenant handed you an original signed letter Regret had given her expressing his complete satisfaction with the Agreement as revised, affirming that he unequivocally refused to consult with an attorney, and stating that he expressly waived his right to do so. You stored Regret's letter in a safe place as an insurance policy against any attempt he might make to avoid enforcement of the Agreement.

Two weeks after Regret received the final version of the Agreement, Covenant and Regret signed it. Regret separately initialed Paragraph 16, which stated:

> Although Regret has been strongly advised to have the Agreement reviewed by an attorney of his choice, he declines to do so. Regret knowingly and voluntarily waives his right to independent counsel. Regret is a California certified family law specialist (having more than twenty years' experience practicing family law, including preparation of hundreds of premarital agreements), and is author of the book *Nip It In The Nupt: Your Guide To California Premarital Agreements.* All five revisions Regret requested be made to the Agreement (each revision substantially benefiting him) were, in fact, made to the Agreement. Regret has carefully read the Agreement, fully understands its effects, and is completely satisfied with it.

Covenant told you how pleased she had been with your representation. She paid your fee, referred you four solvent clients, and sent you a gift certificate to a fancy restaurant.

Covenant was happy and you were happy.

B. 2002: SENATE BILL 78 BECOMES LAW

On January 1, 2002, Senate Bill section 78 became effective and Subdivisions 1612(c) and. 1615(c) became law. Subdivision 1615(c)(1) conclusively "deems"[6] that a premarital agreement is unenforceable against any fiancé who wasn't represented by independent legal counsel at the time of signing the agreement.

C. 2006: *FELLOWS* IS DECIDED

On July 20, 2006, the California Supreme Court decided *In re Marriage of Fellows* (2006) 39 Cal.4th 179, holding that Section 4502(c) applied retroactively to prohibit a parent's use of laches to defend against child support enforcement.

Fellows interpreted Section 4[7] to require that most Family Code amendments be applied retroactively.

D. 2006: COVENANT RETURNS

Unhappy differences arose in the Covenant/Regret household. When Covenant met with you yesterday she showed you the dissolution petition with which Regret had served her, and asked you to represent her.

You informed Covenant that you couldn't represent her in her divorce (explaining that you were a potential witness regarding the Agreement) and referred her to Elena Enforce, Esq.

Covenant asked how the enforceability of the Agreement could possibly be disputed, considering all of the steps you took to guarantee its validity. You explained to her that Regret's attorney (Roberta Renege, Esq.) could argue that the Agreement is invalid, in light of *Fellows*, since Regret hadn't been represented by independent legal counsel[8]

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6. For some reason, Subdivision 1615(c) uses of the novel mandate "it shall be deemed" instead of the familiar mandate "it shall be presumed." The Subdivision's "conclusive deeming" is a apparently a "deeming affecting the burden of proof" (Cf. Evid. Code §§605-606), not a "deeming affecting the burden of producing evidence" (Cf. Evid. Code §§603-604).

7. Section 4 provides, in pertinent part: (a) As used in this section: [¶] (1) "New law" means . . . : [¶] (B) The act that makes a change in this code, whether effectuated by amendment, addition, or repeal of a provision of this code. *** (c) Subject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstance existed before, on, or after the operative date, including, but not limited to, commencement of a proceeding, making of an order, or taking of an action.

8. If Enforce attempts an argument that the Agreement is valid on the theory that Regret acted as his own "independent legal counsel," her argument will fail. The word "independent" means, among other things, someone other than the fiancé. If a court created an exception to the Counsel Requirement especially for Regret (in consideration of his particular expertise), where would this judicially-created exception end: a) with a veteran estate planning attorney, b) with a newbie family law attorney, c) with a law school contracts professor? In other areas of law, "advice of counsel rules" are "bright line rules." For example, everyone (even a federal prosecutor intimately familiar with *Miranda* rights) must be *Mirandized* before being subjected to governmental custodial interrogation.

when he entered into the Agreement.

That didn't make Covenant happy.

After Covenant left your office, you read *Smith v. Lewis* (1975) 13 Cal.3d 349 to remind yourself of the extent to which clairvoyance was necessary to avoid malpractice.

That didn't make you happy.

E. COVERING YOUR ASSESSMENT

After reading *Smith v. Lewis,* you telephoned Enforce and offered (*gratis*) to prepare a brief for Covenant regarding non-retroactivity of the Counsel Requirement and enforceability of the Agreement.

You consider it to be in your own best interests for the Agreement to be ruled enforceable. Besides, retroactivity issues have always fascinated you.

3. LEGAL ANALYSIS

A. RETROACTIVITY TEST #1: LEGISLATIVE INTENT

Statutes do not operate retroactively "unless the Legislature plainly intended them to do so." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.)

Although Senate Bill 78 itself states no legislature intent that it be applied retroactively, Section 4(c) recites a legislative intent that, subject to the limitations of Subdivisions 4(f)[9] and 4(h)[10], all Family Code amendments are to be applied retroactively.

Therefore, the legislative intent test for retroactivity of Senate Bill 78 is satisfied.

B. RETROACTIVITY TEST #2: DUE PROCESS

The second retroactivity test is the due process analysis.

Attorneys who were practicing in 1984 at the creation of Sections 2851 and 2640 (then Civil Code sections 4800.1 and 4800.2, respectively) well remember the due process parries and thrusts between California's legislature and courts discussed in cases such as *Buol, Fabian, Hilke,* and *Heikes*[11] and a score of court of appeal cases.

Retroactive application of those Sections was:

- Forbidden in *Buol, Fabian,* and *Heikes,* because those litigants had "vested property rights" that couldn't constitutionally be interfered with retroactively; but

- Permitted in *Hilke* because that litigant's joint tenancy property rights were "unvested" because they were subject to the condition precedent of survivorship.

As stated in *Fellows* at p. 189:

> Even in the face of specific legislative intent, retrospective application is impermissible if it "impairs a vested ... right without due process of law." (*In re Marriage of Fabian* (1986) 41 Cal.3d 440, 447 [224 Cal.Rptr. 333, 715 P.2d 253], codified in section 4, subdivision (h).)

The due process Test #2 is sub-divided into:

- **Test #2A:** State Interest; and
- **Test #2B:** Reliance.

As stated in *Fellows* at p. 189:

> In evaluating a due process claim, we consider two groups of factors: (1) "'[T]he significance of the state interest served by the law [and] the importance of the retroactive application of the law to the effectuation of that interest'"; and (2) "'[T]he extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions.'" (*In re Marriage of Heikes* (1995) 10 Cal.4th 1211, 1219 [44 Cal.Rptr. 2d 155, 899 P.2d 1349], quoting *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 592 [128 Cal.Rptr. 427, 546 P.2d 1371].) These considerations support retroactive application.

1) RETROACTIVITY TEST #2A: STATE INTEREST

As can be seen, the state interest subtest is further divided into two sub-subtests:

> **TEST #2A(1):** "[T]he significance of the state interest served by the law; and"
> **TEST #2A(2):** "the importance of the retroactive application of the law to the effectuation of that interest."

When applying the state interest test to the Counsel Requirement, courts will consider whether California law automatically invalidates any other type of agreement (besides a premarital agreement subject to Senate Bill 78) on the ground that the contracting party didn't have the agreement reviewed by a lawyer before entering into it.

Regret will contend:

- The Counsel Requirement serves the vital state interest of protecting fiancés from unfair premarital agreements;
- The need for the legislation is demonstrated by the many fiancés

9. Subdivision (f) provides: "No person is liable for an action taken before the operative date that was proper at the time the action was taken, even though the action would be improper if taken on or after the operative date, and the person has no duty, as a result of the enactment of the new law, to take any step to alter the course of action or its consequences." Covenant contends that this language immunizes the Agreement from the Counsel Requirement because: a) Regret's execution of the Agreement without independent counsel "was 'proper' at the time the action was taken" in the sense that the execution was then legally effective; b) "the action [was] 'improper'" after the operative date in the sense that, if the Counsel Requirement is applied retroactively, the execution became legally ineffective after that date; and c) if the Counsel Requirement is applied retroactively, Covenant is "liable for [that] action" in the sense that she is now burdened with increased property division and spousal support liability to Regret.

10 Subdivision 4(h) provides, in pertinent part: If ... the court determines, that application of a particular provision of the new law ... in the manner required by this section ... would substantially interfere with ... the rights of the parties ... in connection with an event that occurred or circumstance that existed before the operative date, the court may, notwithstanding this section ... apply ... the old law to the extent reasonably necessary to mitigate the substantial interference."

11. *In re Marriage of Buol* (1985) 39 Cal.3d 751; *In re Marriage of Fabian* (1986) 41 Cal.3d 440; *In re Marriage of Hilke* (1992) 4 Cal.4th 215; *In re Marriage of Heikes* (1995) 10 Cal.4th 1211.

that have been coerced into signing outrageous premarital agreements - agreements which trial courts have ruled valid, despite the fact that the agreements violated the state interest in fair marital property divisions; and
- Considering the rampant financial slaughter of helpless fiancés, retroactive application of the Counsel Requirement is essential to effectuation of the state's interest.

Covenant will contend:

- The legislature had received no indication of widespread financial abuse of premarital agreement signatories and, in any case;
- Trial courts have adequate discretion to protect a signatory by invalidating a coercive premarital agreement due to duress, fraud, undue influence, lack of capacity and/or unconscionability; and
- The Counsel Requirement is a "legal anomaly" given the fact that, except in premarital agreements subject to Senate Bill 78, California law considers adults capable of making their own contract decisions without being required to hire lawyers.

2) RETROACTIVITY TEST #2B: RELIANCE

As can be seen, the reliance **Test #2B** is further divided into four sub-sub-tests:

TEST #2B(1): "[T]he extent of reliance upon the former law,"

TEST #2B(2): "the legitimacy of that reliance,"

TEST #2B(3): "the extent of actions taken on the basis of that reliance, and"

TEST #2B(4): "the extent to which the retroactive application of the new law would disrupt those actions."

When applying the reliance test to the Counsel Requirement, courts will consider whether it was reasonably foreseeable to Covenant that the legislature would pass a law automatically invalidating premarital agreements because the contracting party hasn't had the contract reviewed by a lawyer before signing it.

Regarding **TEST #2B(1)**, Regret will have to concede that Covenant relied on the former law that allowed an unrepresented person to enter into an enforceable premarital agreement.

Regarding **TEST #2B(2)**, Covenant will contend that her reliance on the former law was legitimate, since passage of the Counsel Requirement wasn't foreseeable. Covenant will also contend:

- She made every reasonable effort to induce Regret to obtain legal advice; when Regret refused to do so, there was nothing further she could have done;
- Regret orally waived his right to legal advice on several occasions during his conversations with her;
- Regret twice signed a writing waiving his right to legal advice: the first time by writing her a letter that no one had asked him to write, and the second time by initialing Agreement Paragraph 16; and
- Regret shouldn't be permitted to defend against enforceability of the Agreement due to his own refusal to obtain legal advice.

Regarding **TEST #2B(2)**, Regret may contend (unsuccessfully) that Covenant's reliance wasn't legitimate on the ground that she should have foreseen the passage of the Counsel Requirement.

Regarding **TEST #2B(3)**, Covenant will contend that, especially considering her understandable desire to avoid a second ugly divorce, she married Regret in reliance on the former law.

Regarding **TEST #2B(3)**, Regret may contend that Covenant would have married him anyway, given his many charms.

Regarding **TEST #2B(4)**, Regret will have to concede that retroactive application of the Counsel Requirement would "disrupt" Covenant's actions taken in reliance on the former law that allowed an unrepresented person to enter into an enforceable premarital agreement.

C. RETROACTIVITY PRECEDENT

Covenant will contend that the Counsel Requirement isn't worthy of retroactive application because it doesn't cure any "rank injustice of the former law" as discussed in *Buol*, supra, at pages 760-761:

> We turn to the question whether impairment of Esther's vested property right violates due process of law. Vested rights are not immutable; the state, exercising its police power, may impair such rights when considered reasonably necessary to protect the health, safety, morals and general welfare of the people. (*Bouquet, supra,* 16 Cal.3d at p. 592.) * * * Where "retroactive application is necessary to subserve a sufficiently important state interest" (*Bouquet, supra,* 16 Cal.3d at p. 593), the inquiry need proceed no further. (See *Addison, supra,* 62 Cal.2d at p. 567.) In *Bouquet*, where we validated retroactive application of an amendment to Civil Code section 5118 making the postseparation earnings of both spouses, not just those of the wife, separate property, we emphasized that "[the] state's interest in the equitable dissolution of the marital relationship supports this use of the police power to abrogate rights in marital property that derived from the patently unfair former law." (*Bouquet, supra,* 16 Cal.3d at p. 594.) As noted in *Bouquet*, we reached the same conclusion in *Addison, supra,* 62 Cal.2d 558, wherein we upheld the constitutionality of retroactive application of quasi-community property legislation despite its interference with the husband's vested property rights.

In both *Bouquet* and *Addison* we identified an important state inter-

est in the "equitable dissolution of the marital relationship" and stressed that retroactive application was necessary to remedy "the rank injustice of the former law." (*Bouquet, supra,* 16 Cal.3d at p. 594; *Addison, supra,* 62 Cal.2d at p. 567.) Thus, these cases support the proposition that the state's paramount interest in the equitable dissolution of the marital partnership justifies legislative action abrogating rights in marital property where those rights derive from manifestly unfair laws. ***No such compelling reason exists for applying section 4800.1 retroactively. Section 4800.1 cures no "rank injustice" in the law and, in the retroactivity context, only minimally serves the state interest in equitable division of marital property, at tremendous cost to the separate property owner.*** (Emphasis supplied.)

Covenant will contend that retroactive application of the Counsel Requirement would impose upon her a "requirement with which [she] cannot possibly comply" and would impose upon her a "penalty for lack of prescience of changes in the law" as discussed in *Buol, supra,* at pages 763-764:

> As it stands, ***retroactive application of section 4800.1*** vitiates Esther and Robert's oral agreement, which the trial court found to be valid and enforceable under existing law, and ***imposes a new writing requirement with which Esther cannot possibly comply.*** The parties' legitimate expectations, therefore, are substantially disregarded in favor of needless retroactivity. * * * "The net effect of retroactive legislation is that parties to marital dissolution actions cannot intelligently plan a settlement of their affairs nor even conclude their affairs with certainty after a trial based on then-applicable law." (*Id.,* at p. 479 (Sims, J. dis.).) [¶] We conclude that retroactive application of section 4800.1 would substantially impair Esther's vested property right without due process of law [footnote omitted]. The state interest in equitable dissolution of the marital partnership is not furthered by retroactive effect. Retroactivity only serves to destroy Esther's legitimate separate property expectations as a penalty for lack of prescience of changes in the law occurring after trial. Due process cannot tolerate such a result. (Emphasis supplied.)

Covenant will also quote from *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 449-450:

> Absent patent unfairness in the former law, retroactivity of section 4800.2 is wholly unnecessary. * * * We find no discernible benefit to the state's interest in the equitable dissolution of the marital partnership in such retroactivity. [¶] Finally, we consider the disruptive effect of retroactive application of the statute. ***It is difficult to imagine greater disruption than retroactive application of an about-face in the law, which directly alters substantial property rights, to parties who are completely incapable of complying with the dictates of the new law.*** [¶]By the time the Legislature created the new right to separate property reimbursement which could be waived only by a writing, the parties' marriage had been terminated by a final judgment of dissolution. The spouse who asserted a separate property right adverse to the community could hardly be expected to then execute a writing waiving his right to the property he claimed. [¶] In the interest of finality, uniformity and predictability, ***retroactivity of marital property statutes should be reserved for those rare instances when such disruption is necessary to promote a significantly important state interest.*** (Emphases supplied.)

D. EFFECT OF *FELLOWS*

Regret will cite *Fellows* as authority mandating retroactive application of all Family Code amendments, including the Counsel Requirement.

Covenant will attempt to distinguish *Fellows'* facts of from her own facts regarding both retroactivity tests: the state interest test and the reliance test.

Covenant will draw a factual distinction for purposes of the state interest test by stating that, under *Fellows'* facts, Section 4502(c) was vitally needed to remedy a situation in which:

> ... over 2 million children in California are owed over $ 19 million [sic] in unpaid support, and ... 'many of these children fail to thrive because there are not adequate resources to meet their basic needs.'" * * * ..."[t]hese non-payors are escaping justice by hiding from the child support system for long enough to allow a defense of laches to shield them from ever having to pay the child support they have been court-ordered to pay." (*Id.,* at pp. 2-3.) Eliminating the defense of laches would close "a loophole that allows child support obligors to evade responsibility for their debts," (id., at p. 3), and "strengthen the public policy favoring enforcement of an obligor's responsibility to pay support." (*Fellows, supra,* at p. 189.)

Covenant will contend that allowing non-paying parents to escape justice by evading the child support system long enough to claim laches and leaving their innocent children without adequate resources to meet their basic needs is repugnant to any moral person. Covenant will contend that it is a vital state interest to assure that recalcitrant parents not be let "off the hook" for their children's basic needs just because they have managed to remain recalcitrant for a long period of time. Disallowing laches as a defense to non-payment of child support cures a grave social harm.

Covenant will contend that under the facts of her case, on the other hand, she and Regret are adults with the right to contract as they wish. Covenant will argue that no evidence indicates that the Counsel Requirement would cure any grave social harm.

Covenant will also draw a factual distinction for purposes of the reliance test.

The *Fellows* court observed:

> Fellows contends he reasonably relied on the availability of laches in failing to preserve written proof or to obtain judicial acknowledgment of payment. Fellows' defense did not fail for lack of proof. In fact, the trial court determined that Fellows would have prevailed if laches were available. However, his purported reliance was not reasonable, as discussed previously. The retroactive application of section 4502(c) did not "substantially interfere" with his conduct in violation of due process. (§ 4, subd. (h).). (*Fellows, supra,* at p. 190.)

Covenant will contend that she reasonably relied on the enforceability of the Agreement in marrying Regret without requiring him to consult an independent attorney. She will contend that retroactive application of the Counsel Requirement would unconstitutionally interfere with her vested rights.

E. "CONTRACT RIGHTS" ARE ARGUABLY DISTINCT FROM "VESTED PROPERTY RIGHTS"

Hilke states:

> Retroactive legislation may not be applied when it constitutes an ex post facto law or an impairment of an existing contract, ***or*** when to do so would impair a vested property right without due process of law. (*In re Marriage of Fabian, supra,* 41 Cal.3d at p. 447.) We are concerned in this case only with the question of whether section 4800.1 impairs a vested property right. (*Hilke, supra,* at p. 222; emphasis supplied.)

It is notable that the Supreme Court:

- Specifies "impairment of an existing contract" as grounds for prohibiting retroactive application of a statute separately and distinctly from "impair[ment of] a vested property right without due process of law"; and
- Specifies that in the case before it, the court is concerned "only with the question of whether section 4800.1 impairs a vested property right."

Covenant's chances of immunizing the Property Limitation Provision from the Counsel Requirement are increased if, as indicated above, a statute that "impair[s] an existing contract" is forbidden retroactive application even if the statute doesn't "impair a vested property right without due process of law."

4. PART ONE CONCLUSION

It is unlikely that the Counsel Requirement will be applied retroactively to invalidate the Agreement's Property Limitation Provision.

PART TWO: EFFECT OF SENATE BILL 78 ON SPOUSAL SUPPORT LIMITATION PROVISIONS

5. VALIDITY OF THE SPOUSAL SUPPORT LIMITATION PROVISION

Is it likely that the Counsel Requirement will be applied retroactively to invalidate the Agreement's Spousal Support Limitation Provision?

For purposes of retroactivity analysis, what are the differences between the Property Limitation Provision and the Spousal Support Limitation Provision?

6. YOU WARNED COVENANT ABOUT THE SPOUSAL SUPPORT LIMITATION PROVISION

When you drafted the Agreement in 1999, you told Covenant the interesting history of California's partial adoption of the Uniform Premarital Agreement Act, explaining that, although when first introduced on March 7, 1985, Senate Bill 1143 (California's version of the Uniform Act) listed "the modification or elimination of spousal support" among the permissible subjects of a premarital agreement, this support limitation provision was deleted by a subsequent amendment.[12]

You advised Covenant in 1999 that California law wasn't clear regarding the validity of the Spousal Support Limitation Provision.

7. *PENDLETON AND FIREMAN*

On August 21, 2000, the California Supreme Court decided *In re Marriage of Pendleton* and Fireman (2000) 24 Cal.4th 39, holding premarital agreement support limitations valid in California.

The court observed that, due to the "sea change" that had occurred in California public policy, "when entered into voluntarily by parties who are aware of the effect of the agreement, a premarital waiver of spousal support does not offend contemporary public policy. Such agreements are, therefore, permitted under section 1612, subdivision (a)(7), which authorizes the parties to contract in a premarital agreement regarding '[a]ny other matter, including their personal rights and obligations, not in violation of public policy . . . .' (*Id.,* at p. 53.)

(Discussion of retroactivity of *Pendleton and Fireman* is beyond the scope of this article. The reader is referred to the excellent article *"Retroactivity of Pendleton to Prior Premarital Agreements: When Did We Get the Right to Waive Spousal Support?"* by D. Thomas Woodruff, CFLS, published in the Spring 2001 ACFLS Newsletter. In his article, Mr. Woodruff discusses the possible dates by which the "sea change" had occurred, which is to say, the possible dates to which *Pendleton and Fireman* has retroactive effect. For purposes of the instant article, it will be presumed that the "sea change" had occurred prior to 1999[13] and that, therefore, *Pendleton and Fireman* retroactively validated the Agreement's Spousal Support Limitation Provision.)

12. The California version of the Uniform Act was enacted in 1985 as Civil Code section 5300 et seq., then repealed effective January 1, 1994 and reenacted as part of the new Family Code at section 1600 et seq.

13. This author believes that the "sea change" occurred, at the latest, with the January 1, 1970 effective date of the Family Law Act.

8. HILKE

Regret will cite *In re Marriage of Hilke* (1992) 4 Cal.4th 215 in support of his contention that the Counsel Requirement applies retroactively to the Spousal Support Limitation Provision. In *Hilke*, the California Supreme Court permitted retroactive application of Section 2581.

Robert and Joyce Hilke purchased a residence in 1969, taking title as "husband and wife, as joint tenants." Joyce filed a dissolution petition in 1989. The parties stipulated to bifurcation, with the court terminating their marital status and reserving jurisdiction over property division. After Joyce died (before property division), the administrator of her estate substituted in as a party to the dissolution. Because Joyce's estate plan left her half of the community property to her children:

- If Section 2581 were retroactively applied, Joyce's children would own a one-half interest in the residence (because Section 2581 would have converted the residence from joint tenancy property to community property), whereas
- If Section 2581 were not retroactively applied, Robert would own the entire residence by right of survivorship (because the residence would have remained joint tenancy property).

Predictably, Robert cited *Buol* for the proposition that retroactive application of Section 2581 would unconstitutionally interfere with the *vested* property rights that the 1969 deed had conferred upon him. Joyce's administrator, on the other hand, contended that the 1969 deed *vested* couldn't have conferred vested property rights upon either spouse, since joint tenancy's survivorship rights were subject to the **condition precedent of one spouse's surviving the other.** [14]

The California Supreme Court accepted the administrator's analysis, holding:

- Only vested rights are constitutionally protected from retroactive application of a new statute;
- The survivorship rights conferred by a joint tenancy deed are subject to the condition precedent of one joint tenant's surviving the other;
- Joint tenancy rights, being subject to a condition precedent, aren't vested rights; and therefore
- Joint tenancy rights aren't constitutionally protected from retroactive application of a new statute.

9. RELEVANCE OF *HILKE*

Regret will employ *Hilke* in support of his contention that the Counsel Requirement applies retroactively to the Spousal Support Limitation Provision, as follows:

- Just as survival was a condition precedent to the vesting of Robert Hilke's joint tenancy rights, so a dissolution filing was a condition precedent to the vesting of Covenant's rights under the Spousal Support Limitation Provision;
- When the Counsel Requirement was born on January 1, 2002, Covenant's rights under the Spousal Support Limitation Provision were unvested because the dissolution filing had not yet occurred; and therefore
- Under *Hilke*, the Counsel Requirement may be constitutionally applied to the Regret/Covenant dissolution.

Covenant will contend that, pursuant to the Agreement's own terms, the only condition precedent to the vesting of rights under the Spousal Support Limitation Provision was the parties' ***marriage***, not their **divorce.**

Covenant will point out that if ***divorce filing*** were a condition precedent, before the occurrence of which premarital agreement and postmarital agreement rights remained unvested, then no rights would be meaningful, and either party could be divested of all rights, by statutes enacted before the divorce filing.

Covenant will observe that: a) the Spousal Support Limitation Provision is a waiver, b) a waiver always relates to a future event, and c) the fact that a waiver relates to a future event doesn't mean that the waiver remains unvested until that event has occurred. Covenant will contend that bargained-for waivers like the Spousal Support Limitation Provision become enforceable contracts as soon as they are signed, and don't remain voidable pending the event (e.g., dangerous condition of property, divorce) creating the liability.

Covenant will distinguish *Hilke* by pointing out that a contract such as the Agreement created more sturdily "vested" rights than does a joint tenancy, which either party may unilaterally sever at any time.

Covenant will argue that the Supreme Court's application of condition precedent principles to *Hilke* made good legal and practical sense. When Joyce and Robert Hilke took joint tenancy title to their residence, they impliedly entered into a survivorship contract with each other. Courts are required to interpret contracts in a manner that implements the reasonable intentions of the contracting parties. What would Joyce Hilke's likely response have been had this question been posed: "Ms. Hilke, if you name your children in your Will to receive your property upon your death, then file a dissolution petition against Robert, then pass away, would you intend that your children or Robert receive your half of the residence?" Clearly, her answer would have been, "My children."

Covenant will argue that, in contrast, application of condition precedent principles to the Spousal Support Limitation Provision wouldn't make good legal or practical sense, since it would frustrate, not implement, the reasonable intentions of the contracting parties.

10. PART TWO CONCLUSION

It is unlikely that the Counsel Requirement will be applied retroactively to invalidate the Agreement's Spousal Support Limitation Provision. ■

14. *Hilke* cited *Buol* and *Bouquet* for the proposition that: ". . . a vested property right is one that is not subject to a condition precedent. (*In re Marriage of Hilke*, supra, at p. 222.)