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JAMIE MCCOURT, MEET JILL FRIEDMAN: POST-MARITAL AGREEMENTS AND THE DODGERS

By: Gregory W. Herring; 2009

As baseball fans, family law lawyers and pretty much everyone else knows by now, the ownership of the Los Angeles Dodgers is hotly contested in the marital dissolution proceedings recently filed by Jamie McCourt against Frank McCourt. The Dodgers were acquired by the McCourts during their marriage, which created a presumption that the asset was and is community property. But Frank alleges that the couple entered into a post-marital agreement that gave him sole ownership. He claims that that decision was made by Jamie to insulate herself from any debts or creditor's claims that might result from purchasing the team, which was then reportedly losing more than \$75 million a year.

Having seen Joe Torre and Manny Ramirez help turn the franchise around, Jamie now argues that the post-marital agreement is invalid and that the Dodgers are community property.

The issue of the agreement's enforceability will be determined at the intersection of policies that allow spouses to freely enter into contracts, but also provide for fiduciary duties between them.

Standing there over seven years ago were Santa Barbara attorney, Jill Friedman, and her then-estranged husband, Keith. Before discussing the Friedmans, however, a brief review of the foundational law might be helpful:

* * *

California has a strong public policy interest in fostering and protecting marriages, and properly negotiated and drafted post-marital agreements can facilitate this. Spouses are thus authorized to freely contract with one another to alter their property rights. (Fam. Code § 1500.) A post-marital agreement may transmute (1) community property to the separate property of either spouse, (2) separate property of either spouse to community property and (3) separate property of one spouse to separate property of the other spouse. (*Id.*, § 850). Post-marital agreements that transmute property other than clothing, jewelry and other tangible personal items of nominal value and that were made after 1984 must be made in *writing* "by an express declaration that is



made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.” (*Id.*, 852(a); *Estate of MacDonald* (1990) 51 Cal.3d 262.)

The laws concerning post-marital agreements are significantly different from those relating to *pre-marital* agreements:

- Post-marital agreements are *not* governed by California’s version of the Uniform Premarital Agreement Act (Family Code sections 1600 - 1617).
- A party negotiating a post-marital agreement need not be represented by counsel or sign a written waiver of same.
- Parties negotiating a post-marital agreement are presumed to be in a confidential relationship. As such, spouses have fiduciary duties to each other under Family Code section 721.
- A spouse gaining an advantage from a post-marital agreement is subject to a presumption that he exerted undue influence over the other. (As another baseball personality, Barry Bonds, was happy to hear earlier this decade, parties negotiating a *pre-marital* agreement are *not* subject to that presumption. (*See Marriage of Bonds* (2000) 24 C4th 1, 27–30).)

* * *

Returning to the Friedmans, their prior case illuminates the difficulties Jamie might encounter in trying to claw back a piece of the Dodgers. According to the Court of Appeal’s eventual Opinion in the Friedman case (below), the facts were as follows:

- In December 1990 Jill worked as an attorney for a “prestigious” law firm. She met Keith Friedman, who wanted to start a forensic consulting business. Jill said that she wanted to keep her law practice as separate property if she married. Keith agreed.
- Weeks later, Keith was diagnosed with leukemia. Jill urged him to undergo a bone marrow transplant and proposed marriage so that he could be placed on her medical insurance. He agreed, and they married.
- Within days Keith called his attorney, stating that he wanted to protect Jill from creditors if he did not survive the medical treatment, which was a distinct possibility. The attorney suggested a post-marital agreement, providing that their individual income, business property and debts would be each spouse’s respective separate property. The agreement was rapidly negotiated and completed.
- Keith underwent the treatment and fully recovered. Moreover, his business flourished beyond anyone’s dreams. Jill then desired to terminate the agreement, but Keith was not convinced. She eventually filed for divorce.



(As set forth below, Jill, who was contacted regarding this article, makes some clarifications to the Court of Appeal's rendition of the factual record.)

The agreement's enforceability was a major preliminary issue that was heard on an interlocutory appeal, which resulted in a published Opinion from our local Division of the Court of Appeal (*In re Marriage of Friedman* (2002) 100 Cal.App.4th 65). In at least two aspects, it would appear to contravene some of Jamie's anticipated arguments.

First, the Court's "observations" emphasized the right of spouses to enter into transmutation contracts with each other:

"Where, as here, the agreement is lawful, either party may insist upon adhering to its letter. This protects the reasonable expectations of the parties at the time the bargain was struck. Subsequent events, whether unforeseen or fortuitous, and whether they favor one side or the other, should not dictate how we decide the legal issue here presented."

(*Marriage of Friedman, supra*, at 73.)

Second, the Court countered Jill's assertion of the presumption of undue influence by emphasizing that the trial court had expressly found that, as "a bright woman" and "a trained attorney," Jill understood the agreement's scope and purpose and "no one held a gun to her head" (*Id.*, at 69.)

As someone who has projected confidence in her professional competence, lawyer Jamie might find it hard to "play dumb." Contrarily, Jamie's biography reportedly cites her law degree from the University of Maryland, her master's in business administration from MIT and her experience practicing family law, of all things.

Beyond the above, Jamie has reportedly asserted, as a defense, that she was not represented by her own lawyer in negotiating the agreement. In signing the document, however, she reportedly acknowledged in writing that she had "been advised to seek separate and independent counsel."

Bad for Jamie is the fact that *Jill* was similarly unrepresented in negotiating the Friedman agreement. Moreover, *that* agreement lacked *any* attorney waiver and the Court still found against Jill.

Ultimately, if it was Jamie's idea to transmute the Dodgers from community property to Frank's separate property (especially if to selfishly protect her own interests), she is likely wishing that the Friedmans had remained in matrimonial bliss and that the Court had thus lacked the occasion to write its Opinion.



In the meantime, the Dodgers are reportedly in at least some disarray as a result of the discord. As a result, Giants fans are experiencing *schadenfreude* and enjoying more reason than ever to hope for the Pennant in 2010.

Jill Friedman became Greg's client following the issuance of the Appellate Opinion. As a courtesy, she was contacted regarding this article. While it may or may not have been important to the Court of Appeal's decision, she would correct the Court's version of the facts to indicate that the discussions re dividing property did not occur until after marriage and the discovery of Keith's illness.

She also points out that the parties figured out a way to get him on her insurance so that he could have the bone marrow transplant. The plan involved getting married right away. Keith had already proposed to Jill and she had already accepted. So, they went to Las Vegas, did the deed and the rest is history.