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OPINION	:	No. 10-503
of	:	August 25, 2011
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THE HONORABLE TONY STRICKLAND, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

When marriage partners have entered into a premarital agreement specifying that each spouse has no present or future financial interest whatsoever in the income or assets of the other spouse, are the financial interests of one spouse nevertheless attributable to the other spouse for purposes of determining conflicts of interest under Government Code section 1090?

CONCLUSION

When marriage partners have entered into a premarital agreement specifying that each spouse has no present or future financial interest whatsoever in the income or assets of the other, the financial interests of one spouse are nevertheless attributable to the other spouse for purposes of determining conflicts of interest under Government Code section 1090.

ANALYSIS

This question requires us to construe and apply the conflict-of-interest proscription found in Government Code section 1090, which prohibits public officers, acting in their official capacities, from making contracts in which they are "financially interested."[1] We are asked whether such prohibited financial interests would include the income or assets of a public officer's spouse when the marital partners have a prenuptial agreement providing that neither spouse may "ever" acquire or retain any interest in the income or assets of the other. We conclude that, notwithstanding such an agreement, one spouse's financial interests must be attributed to the other spouse for purposes of determining conflicts of interest under Government Code section 1090.[2]

Government Code Section 1090

Government Code section 1090 provides, in part, that public officials "shall not be financially interested in any contract made by them in their official capacity, or by any

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[1] The term "financially" was added to section 1090 in 1963 (1963 Stat. ch. 2172 § 1), in an amendment that "made explicit that the prohibition in the section against conflict of interest is restricted to financial interest, and the possibility that the section might apply to some other type of interest has been eliminated." (*People v. Watson*, 15 Cal. App. 3d 28, 34 (1971) (footnote omitted.) In view of that 1963 amendment, cases interpreting the term "interest" prior to 1963 must be carefully scrutinized. (*People v. Gnass*, 101 Cal. App. 4th 1271, 1288, n. 4 (2002); *People v. Honig*, 48 Cal. App. 4th 289, 313 (1996).)

[2] The Political Reform Act of 1974 (Govt. Code §§ 81000-91014) generally prohibits public officials from participating in or attempting to influence "governmental decisions" in which they have a financial interest. (Govt. Code § 87100; *see, e.g.*, 88 Ops.Cal.Atty.Gen. 32, 33-34 (2005); 78 Ops.Cal.Atty.Gen. 362, 368-374 (1995).) Because section 1090 is the sole focus of the question before us, however, we do not address whether a prenuptial agreement might affect determinations under the Political Reform Act.

body or board of which they are members." When an official is a member of a legislative body, the prohibition extends to the entire body on which he or she serves. In such situations, when a proscribed conflict of interest exists as to one member of the body, any affected contract entered into by the body is void and unenforceable—even if the conflicted member refrained from participating in any of the steps involved in making the contract.[3]

Section 1090 codifies the common law prohibition against "self-dealing" with respect to contracts.[4] Its purpose and effect were recently summarized by the California Supreme Court in *Lexin v. Superior Court*:[5]

> The common law rule and section 1090 recognize "[t]he truism that a person cannot serve two masters simultaneously . . . ." (*Thomson v. Call* (1985) 38 Cal.3d 633, 637; see *Stockton P. & S. Co. v. Wheeler* (1924) 68 Cal.App. 592, 601 [the bar against being financially interested in the contracts one makes in an official capacity "is evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed"].) "The evil to be thwarted by section 1090 is easily identified: If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality." (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1330.) Where public and private interests diverge, the full and fair representation of the public interest is jeopardized.
>
> Accordingly, section 1090 is concerned with ferreting out any financial conflicts of interest, other than remote or minimal ones, that might impair public officials from discharging their fiduciary duties with undivided loyalty and allegiance to the public entities they are obligated to serve. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Where a prohibited interest is found, the affected contract is void from its inception

[3] *See Thomson v. Call,* 38 Cal. 3d 633, 649 (1985); *Stigall v. City of Taft,* 58 Cal. 2d 565, 570-571 (1962).

[4] *See* 1851 Stat. ch. 136 § 1; *Lexin v. Super. Ct.*, 47 Cal. 4th 1050, 1072 (2010); *Brandenburg v. Eureka Redevelopment Agency*, 152 Cal. App. 4th 1350, 1361 (2007); *Honig*, 48 Cal. App. 4th at 317.

[5] *Lexin,* 47 Cal. 4th 1050.

(*Thomson v. Call*, *supra*, 38 Cal.3d at p. 646 & fn. 15), and the official who engaged in its making is subject to a host of civil and (if the violation was willful) criminal penalties, including imprisonment and disqualification from holding public office in perpetuity (§ 1091; *People v. Honig*, *supra*, 48 Cal.App.4th at p. 317; 89 Ops.Cal.Atty.Gen. 121, 123 (2006), hereafter *Fellows*.).[6]

"[T]he prohibited act is the making of a contract in which the official has a financial interest,"[7] and officials are deemed to have a financial interest in a contract if they might profit from it in any way.[8] Prohibited financial interests extend to *expectations* of prospective economic benefit as well: "a financial interest within the meaning of section 1090 may be direct or indirect and includes the contingent possibility of monetary or proprietary benefits."[9] Furthermore, "forbidden financial interests … may involve *financial losses*, or the possibility of financial losses, as well as the prospect of pecuniary gain," and this is so whether the loss, or potential loss, is direct or indirect.[10] All the circumstances of the transaction as a whole must be considered in determining whether a proscribed financial interest would be present in the contract.[11]

In *Lexin,* the Court explained that the term "financially interested" cannot be interpreted in a restricted or technical manner, but instead must be understood to encompass any situation where official judgment may be influenced by personal considerations rather than the public good.[12] The ban imposed by section 1090 does not presuppose wrongdoing; rather, the rule operates chiefly as a preventive measure to protect the honor of well-meaning officials and to safeguard the public interests they serve, drawing from general understandings about human nature:

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[6] *Lexin*, 47 Cal. 4th at 1073 (parallel citations omitted). See also *People v. Wong*, 186 Cal. App. 4th 1433, 1450-1451 (2010).

[7] *Honig,* 48 Cal. App. 4th at 333.

[8] *Id.*; *accord*, *Gnass*, 101 Cal. App. 4th at 1288, n. 6; *see BreakZone Billiards v. City of Torrance,* 81 Cal. App. 4th 1205, 1230-1231 (2000); *Fraser-Yamor Agency, Inc. v. Co. of Del Norte*, 68 Cal. App. 3d 201, 212-215 (1977); *Hotchkiss v. Moran*, 109 Cal. App. 321, 323 (1930).

[9] *Honig,* 48 Cal. App. 4th at 315, 325; *see People v. Vallerga*, 67 Cal. App. 3d 847, 865 (1977); *People v. Darby,* 114 Cal. App. 2d 412, 433, n. 4 (1952).

[10] 86 Ops.Cal.Atty.Gen. 138, 140 (2003); (emphasis added).

[11] *Thomson*, 38 Cal. 3d at 645; *Honig,* 48 Cal. App. 4th at 315, 320; *Watson*, 15 Cal. App. 3d at 37; *Darby*, 114 Cal. App. 2d at 431-432.

[12] *Lexin*, 47 Cal. 4th at 1075; *see Wong*, 186 Cal. App. 4th at 1450-1451.

> The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning [individuals] when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, *the statute is more concerned with what might have happened in a given situation than with what actually happened.* It attempts to prevent honest government [employees] from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.[13]

Finally, as we and the courts have often observed, any analysis of questions arising under section 1090 must adhere to the applicable rules of statutory construction. Section 1090's conflict-of-interest ban must be interpreted broadly and enforced assiduously to promote the statute's salutary purpose, while exceptions to the rule must be construed narrowly to avoid undermining that purpose.[14]

Spouses' Interests

In the case of married officials, "it has long been held that a person's interest in a spouse's employment and income is a financial interest within the meaning of section 1090."[15] For purposes of section 1090, a married official "'stands in the shoes of his spouse.'"[16] For example, we have found that a city employee has a cognizable interest in her husband's private-sector employment because the financial success of her husband's firm, along with his continued employment and compensation, affect the city employee's

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[13] *Stigall*, 58 Cal. 2d at 570 (emphasis in original) (quoting *U. S. v. Miss. Valley Generating Co.*, 364 U.S. 520, 549-550 (1961)).

[14] *See, e.g.*, *Stigall*, 58 Cal. 2d at 569-571; *Thorpe v. Long Beach Community College Dist.*, 83 Cal. App. 4th 655, 663-664 (2000); *Honig*, 48 Cal. App. 4th at 315; *Eldridge v. Sierra View Hosp. Dist.*, 224 Cal. App. 3d 311, 324 (1990); 86 Ops.Cal.Atty.Gen. 142, 145 (2003); 81 Ops.Cal.Atty.Gen. 169, 174-175 (1998).

[15] *Honig*, 48 Cal. App. 4th at 319; *see also* 89 Ops.Cal.Atty.Gen. 69, 72 (2006) ("It has long been held that the financial interest of one spouse will be attributed to both spouses for purposes of section 1090"); 78 Ops.Cal.Atty.Gen. 230, 237 (1995) ("Under settled case law and opinions of this office, a member of a board or commission *always* is financially interested in his or her spouse's source of income for purposes of section 1090").

[16] 89 Ops.Cal.Atty.Gen. 258, 264 (2006).

financial well being.[17] Similarly, we have concluded that a school board member's spouse may not be hired by the school district in any employment capacity, including as a substitute teacher, because of the member's inherent financial interest in his spouse's income and assets.[18] By the same token, because a spouse's income and interests are attributed to the official for purposes of section 1090, any exceptions to the 1090 ban that would apply to an official's direct interest in particular income or property are equally applicable to the income and property of the official's spouse.[19]

Premarital Agreements

In California, premarital agreements are governed by Division Four, Part Five, of the Family Code,[20] which includes the Uniform Premarital Agreement Act.[21] They are defined as agreements "between prospective spouses made in contemplation of marriage and to be effective upon marriage."[22] Through such agreements, marital partners may override otherwise controlling statutory definitions of their respective property rights as spouses. Section 1500 provides that, "The property rights of husband and wife prescribed by statute may be altered by a premarital agreement or other marital property agreement." "Property," in turn, is broadly defined as "an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings."[23]

To be valid, premarital agreements must be in writing and signed by both parties.[24] Such agreements may address and control a variety of subjects:

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[17] 85 Ops.Cal.Atty.Gen. at 38.

[18] 80 Ops.Cal.Atty.Gen. 320, 321-322 (1997).

[19] *See, e.g.*, 81 Ops.Cal.Atty.Gen. at 172-174 (applying standards for "noninterest" and "remote interest" exceptions); 78 Ops.Cal.Atty.Gen. at 237 ("remote interest" exception); 69 Ops.Cal.Atty.Gen. 102, 110-112 (1986) (rule of necessity; noninterest exception).

[20] Fam. Code §§ 1500-1620. (1992 Stat. ch. 162, § 10 (Assembly 2650).)

[21] Fam. Code, Div. 4, Pt. 5, ch. 2, §§ 1600-1617. Further references to provisions of the Family Code are by section number only.

[22] §§ 1610(a), 1613.

[23] § 1610(b).

[24] § 1611. The same requirements apply to any subsequent amendments to, or revocations of, prenuptial agreements. § 1614.

> Parties to a premarital agreement may contract with respect to all of the following:
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> (1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.
>
> (2) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.
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> (3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.
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> (4) The making of a will, trust, or other arrangement to carry out the provisions of the agreement.
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> (5) The ownership rights in and disposition of the death benefit from a life insurance policy.
>
> (6) The choice of law governing the construction of the agreement.
>
> (7) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.[25]

In *In re Marriage of Pendleton & Fireman*, a 2000 decision, the California Supreme Court observed that the scope of these agreements has expanded over time, concluding that post-separation spousal support may be effectively waived in a premarital agreement because such waivers are no longer presumptively violative of public policy and are not *per se* unenforceable.[26] Inheritance rights, too, may be modified or waived in a premarital agreement.[27]

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[25] § 1612(a).

[26] *See In re Marriage of Pendleton & Fireman*, 24 Cal. 4th 39, 53 (2000) ("[W]hen 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) . . . .") (overruling in part *In re Marriage of Higgason,* 10 Cal. 3d 476 (1973). *Cf.* § 4302).

[27] §§ 1612(a)(3), 1612(a)(4); Prob. Code §§ 140-147. *See also Estate of Will*, 170 Cal. App. 4th 902, 907 (2009).

There are, however, some limitations to the scope and force of premarital agreements, and there are certain rights, interests, and public policies that will trump contrary provisions contained in such agreements. For example, the law imposes an affirmative obligation on each spouse to support the other during the marriage,[28] and provides that, while the marital partners are living together, such support shall come "out of the separate property of the person when there is no community property or quasi-community property."[29] Similarly, the rights of children to support "may not be adversely affected by a premarital agreement."[30]

Are Spousal Financial Interests Sufficiently Terminated by the Agreement?

We assume for purposes of this analysis that the hypothetical premarital agreement under consideration here disclaims any and every interest that one spouse might have in the other's income and assets—including rights of inheritance upon the spouse's death, rights to benefits under insurance policies, and rights of post-separation spousal support. Would such an agreement effectively terminate each party's financial interests in the spouse's income, employment, and assets for purposes of section 1090?

In a 1982 opinion, we addressed a situation in which an incumbent county superintendent of schools married a classified employee whose wages, hours, and conditions of employment were determined by an existing memorandum of understanding (MOU) between the superintendent and representatives of all classified civil service employees in his office.[31] We were asked whether section 1090 would prohibit the superintendent from modifying that MOU, and our analysis included a discussion, relevant here, of whether a premarital agreement might have changed our conclusion:

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[28] § 4300.

[29] §§ 914, 4301.

[30] § 1612(b). This provision is discussed in *Pendleton*, 24 Cal. 4th at 49 (majority opn.) and 54 (concurring opn. of Mosk, acting C.J.). *See* § 3900 (parents of minor child have "an equal responsibility to support their child in the manner suitable to the child's circumstances"); §§ 4050-4075 (statewide uniform child support guideline); *In re Marriage of Leonard*, 119 Cal. App. 4th 546, 555 (2004) (duty to support children is "fundamental parental obligation," and state has strong public policy favoring adequate child support); *Co. of Shasta v. Caruthers*, 31 Cal. App. 4th 1838, 1849 (1995) (child's right to support cannot be compromised by agreement of parents).

[31] 65 Ops.Cal.Atty.Gen. 305 (1982).

> Absent an agreement making her earnings her separate property, his wife's earnings while they are living together would be community property in which he would have an equal interest. (Civ. Code, §§ 5103, 5105, 5110, 5118.) However, even if the superintendent and his spouse entered into such an agreement, his wife's earnings, although her separate property, would still be liable for the necessaries of life of either spouse and constitute a "financial interest." (Civ. Code, §§ 5121, 5132.) The leading case, *Nielsen v. Richards* (1925) 75 Cal.App. 680, which is still viable law, so held. It also involved a county superintendent of schools and held that such superintendent could not hire his wife as a supervising rural teacher by virtue of section 920 of the Political Code, the predecessor to section 1090 of the Government Code, despite the fact that his wife's earnings were, by agreement, considered her separate property. Therefore, so long as the superintendent and his wife continue in a normal marriage relationship, there is no way he can avoid being 'financially interested' in his wife's earnings, and hence her employment, within the meaning of section 1090 of the Government Code.[32]

We followed that reasoning in a 1995 opinion, concluding that an official would be financially interested in a development contract because his spouse's law firm represented the developer in unrelated matters:

> While the council member's spouse would have a financial interest in the development agreement, would the council member have one as well? Under settled case law and opinions of this office, a member of a board or commission always is financially interested in his or her spouse's source of income for purposes of section 1090. This is true even if the husband and wife have an agreement that their own earnings are to be treated as their separate property, since each spouse is liable for the necessities of life for the other. (*See Reece v. Alcoholic Bev. Etc. Appeals Bd.* (1976) 64 Cal.App.3d 675, 683; *Nielsen v. Richards* (1925) 75 Cal.App. 680, 685-687; 73 Ops.Cal.Atty.Gen. 191, 194-195 (1990); 69 Ops.Cal.Atty.Gen. 102, 106 (1986).)[33]

We came to the same conclusion in a 1997 opinion, relying on Family Code section 914 and once again citing the *Nielsen* case. We observed that an employee of the

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[32] *Id.*, 65 Ops.Cal.Atty.Gen. at 308 (footnote omitted).

[33] 78 Ops.Cal.Atty.Gen. at 237.

state Public Utilities Commission was financially interested in the regulated utility employing his or her spouse, and that "this interest may not be nullified by an agreement that the spouse's compensation be treated as his or her separate property, since even separate property is liable for the necessaries of life of the other spouse."[34]

In the years since we issued those opinions, public policy concerning spousal support has undergone a significant change, and, as *Pendleton* illustrates, premarital agreements have been accorded greater breadth and enforceability by the courts.[35] We therefore think it useful to revisit the conflict-of-interest question here, in the context of a prenuptial contract that purports to categorically waive each partner's interests in any and all income and assets acquired by the spouse during the marriage.

As we consider this question, we bear in mind that, even in the case of an airtight separate-property agreement, a marital partner could probably never be completely objective or disinterested when it comes to matters affecting the financial interests of his or her spouse or children. Indeed, it "would be naive to assume that a husband has no concern about the property of his wife (or vice-versa) simply because it is her separate property," and such neutrality "would be both unnatural and undesirable."[36] "Common sense tells us that although an official may have no economic interest in [his spouse's separate] property, nevertheless he may react favorably, or without total objectivity, to a proposal which could materially enhance the value of that property."[37] By the same token, that official might naturally react unfavorably to proposals that could materially

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[34] 80 Ops.Cal.Atty.Gen. 27, 28 (1997). The *Nielsen* agreement was executed by a husband and wife during their marriage in hopes of avoiding a specific and foreseeable conflict of interest in their employment setting. The husband school superintendent purported to waive any interest in the money that his wife would earn once he hired her as a supervising teacher in his district. (*Nielsen*, 75 Cal. App. at 682.) Here, in contrast, our hypothetical spouses have a premarital agreement in which each partner has categorically waived *all* financial interests in any and all of the income and assets of the other partner acquired during the marriage. These distinctions do not affect our analysis because, as we explain, the rationales of *Nielsen* and our previous opinions apply equally in both circumstances.

[35] *Pendleton*, 24 Cal. 4th at 39.

[36] *Reece v. Alcoh. Bev. Etc. Appeals Bd.*, 64 Cal. App. 3d 675, 683 (1976).

[37] *Co. of Nevada v. MacMillen*, 11 Cal. 3d 662, 675-676 (1974). *See* 89 Ops.Cal.Atty.Gen. 69, 72 (2006) (although retirement account held in name of spouse alone, official has personal financial interest because "it may inure to her direct benefit as a designated beneficiary or otherwise contribute to her support.")

diminish the value of his spouse's separate property and cause her economic harm.[38]

Nonetheless, the sole focus of section 1090 is *financial* interests—not emotional or psychological connections— and we have elsewhere observed that conflicts under section 1090 are normally eliminated by an official's simply putting an end to the offending financial interest: "In ordinary circumstances, an official with a proscribed financial interest, whether a partnership interest or some other type of financial interest, may terminate the interest and thereby avoid section 1090's proscription."[39] Theoretically, therefore, it should be possible for an official to participate in the making of contracts affecting the financial interests of his or her spouse if the official were first able to completely and absolutely sever *all* connections, direct and indirect, with those interests.

Under current California law, however, as was the case at the time of *Nielsen* and our previous opinions, such a total and absolute separation of spouses' financial interests during marriage appears to be unattainable as a matter of law. The *Pendleton* decision marked a significant change in law, to be sure, giving spouses more discretion to disconnect their respective incomes and assets in recognition of evolving public policies,[40] but today's legal landscape still includes rules that link one spouse's financial situation to the other's separate property in certain circumstances. No matter how unequivocal a premarital agreement may seem to be in its purported separation and divestiture of interests, therefore, each spouse nevertheless retains at least an indirect or contingent material financial interest in the income and assets of the other spouse.

Thus, premarital agreements cannot nullify or diminish each spouse's legal obligation to apply his or her separate property for expenses "reasonably necessary" to support the other "according to the parties' station in life" during their marriage while the two are living together.[41] Even with a premarital waiver of interests in a spouse's

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[38] *See* 86 Ops.Cal.Atty.Gen. at 140 (financial interest also exists where contract would introduce potential for financial losses).

[39] 89 Ops.Cal.Atty.Gen. at 75. *See* 81 Ops.Cal.Atty.Gen. 134, 138 (1998) (§ 1090 ceases to bar negotiations if council member "divests himself of his financial interest"); *see also City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191, 197 (1980) (concessionaire must choose between continuing her ownership of conflict-causing business or remaining on city council).

[40] *Pendleton*, 24 Cal. 4th at 39.

[41] *Higgason*, 10 Cal. 3d. at 488. *See Nielsen*, 75 Cal. App. at 685-687; 80 Ops.Cal.Atty.Gen. at 28; 65 Ops.Cal.Atty.Gen. at 308. We note that the California Supreme Court's holding to this effect in *Higgason* remains the law with respect to spouses' mutual obligations *while living together during their marriage*, and that

separate property, then, such property remains liable under law to fund the other spouse's "necessaries of life."[42] This obligation to tap separate property for support occurs "when there is no community property or quasi-community property."[43] As one court observed, this duty means that "the wife's separate property adds a sum of money for her support and indirectly to the support of her spouse."[44] And, manifestly, the need to make actual expenditures for a spouse's support and "necessaries of life"[45] would more likely arise if that spouse's own income and assets were diminished.[46] Thus, the separate property of one's spouse may serve both as an emergency reservoir of assets available to ensure one's own comfort in difficult times and as a hedge against the need to expend one's own separate assets to support that spouse—a dynamic that highlights the marital partners' continuing financial connections and interdependence notwithstanding their prenuptial agreement.

Pendleton later overruled *Higgason* only with respect to whether spouses' *post-dissolution* support obligations may be validly altered by a pre-nuptial agreement. *See* 24 Cal. 3d at 41 (*Pendleton* waiver was "in the event of a dissolution of the marriage"), 46-53 (discussing evolution of public policy regarding post-dissolution spousal support). Indeed, the *Pendleton* Court expressly distinguished society's evolving views about support *after* marital dissolution from the traditional—and unchanged—expectations of spousal support *during* marriage:

> Public policy toward spousal support has also changed. *While spouses must support each other during marriage* (§ 4300), the court has been given greater discretion in marital dissolutions to deny spousal support altogether or to limit such support in an amount and duration that reflects the ability of both parties in contemporary unions to provide for their own needs.

Pendleton, 24 Cal. 4th at 52 (emphasis added).

[42] *Nielsen*, 75 Cal. App. at 685.

[43] § 4301 (formerly Civ. Code § 5132); *see* § 720 ("Husband and wife contract toward each other obligations of mutual respect, fidelity, and support"). *See also In re Marriage of Epstein*, 24 Cal. 3d 76, 83 (1979); *Higgason*, 10 Cal. 3d at 487-488; *See v. See*, 64 Cal. 2d 778, 784 (1966). That duty ends if the spouses live separately by agreement. (§ 4302.)

[44] *Reece,* 64 Cal. App. 3d at 683.

[45] *Nielsen*, 75 Cal. App. at 685-687; *see* 80 Ops.Cal.Atty.Gen. at 28; 65 Ops.Cal.Atty.Gen. at 308.

[46] *See, e.g.*, *Schlecht v. Schlecht*, 99 Cal. App. 163, 168 (1929) (husband not entitled to be supported by wife's separate property "so long as he had sufficient means of his own").

Furthermore, premarital agreements do not defeat or diminish the parties' legal obligation to apply their separate property to pay for the basic needs of their children,[47] and the cost of that obligation to one spouse would presumably depend to a significant extent upon the other spouse's financial ability to shoulder a share of the burden. This relationship, too, demonstrates the continuing financial interest of one spouse in the separate property of the other.

We also note that, even in a *Pendleton* situation where spouses have validly waived their rights to post-separation spousal support, such provisions may not be enforceable if they are found to be "unconscionable at the time of enforcement"[48]—that is, if subsequent circumstances have rendered it "unjust" to hold the parties to their contract.[49]

Accordingly, and in harmony with judicial precedent and our earlier opinions, we conclude that one spouse's financial interests are attributable to the other spouse for purposes of determining conflicts of interest under Government Code section 1090, even when the marriage partners have entered into a premarital agreement specifying that each spouse has no present or future financial interest whatsoever in the income or assets of the other.

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[47] This restriction is expressly stated in section 1612(b), which provides that "[t]he right of a child to support may not be adversely affected by a premarital agreement." *See Pendleton*, 24 Cal. 4th at 49; *see also* §§ 3900, 4050-4075; *Leonard*, 119 Cal. App. 4th at 555; *Co. of Shasta*, 31 Cal. App. 4th at 1849.

[48] § 1612(c). *See* Prob. Code §§ 144(b), 146(g) (courts may refuse to enforce surviving spouse's waiver of inheritance rights if enforcement would be unconscionable under all relevant facts and circumstances at the time enforcement is sought).

[49] *Pendleton*, 24 Cal. 4th at 53. *See also* Prob. Code §§ 144(b), 146(g).