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THE RECORDER

The Uncertainty of Spousal Support Waivers

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As an attorney drafting a premarital agreement, can you safely advise your client that a waiver or limitation on spousal support will be enforceable many years in the future? Maybe not.

When two people marry, their marital contract includes, among other things, a mutual obligation to support one another. Even after spouses separate with the goal of ending their marriage, the Family Code provides for spousal support orders, both pending trial ("temporary" support) and in the judgment of dissolution ("permanent" support).

For many years, California courts and the Legislature have grappled with whether, and under what circumstances, spouses may contractually limit or waive this obligation to support one another. While Family Code §1612(c) currently states that spousal support waivers will not be enforced if they are unconscionable, the test of unconscionability in this context has been unclear. Most recently, in *In Re Marriage of Facter*, 13 C.D.O.S. 584, the First District Court of Appeal provided much anticipated guidance regarding the facts and circumstances that might make a spousal support waiver unconscionable and, therefore, unenforceable. Another new case, *In re Marriage of Melissa,* 212 Cal.App.4th 598 (2012) (as modified on Jan. 15, 2013), addressed retroactivity of the California statute dealing with spousal support waivers, further complicating the analysis of spousal support waiver enforceability.

The Evolution of Spousal Support Waivers

In California, the law governing spousal support waivers has evolved somewhat enigmatically since 1970, when "no-fault divorce" became the law of the land.

In *In re Marriage of Higgason*, 10 Cal.3d 476 (1973), the California Supreme Court was presented with a premarital agreement, signed in 1969, which contained a mutual spousal support waiver. At issue was a brief and tumultuous marriage between a wealthy woman, age 73, and her pauper husband, age 48. During the parties' two-year marriage, husband had suffered multiple illnesses, which required hospitalization and surgery. At trial, husband was physically disabled, unable to support himself financially, and saddled with significant medical bills, incurred during marriage, which he could not afford to pay.

The *Higgason* court held that the spousal support waiver in the parties' premarital agreement was invalid as against public policy, and did not preclude the court from ordering post-separation spousal support.

Thereafter, effective Jan. 1, 1986, the California legislature adopted Family Code §1612, modeled after the Uniform Premarital Agreement Act, which details proper subject matter for premarital agreements. Notably, this section omitted the provision of the UPAA providing that parties to a premarital agreement may contract with respect to "the modification or elimination of spousal support."

Many years later, the trial court in *In re Marriage of Pendleton and Fireman*, 24 Cal.4th 39 (2000), ruled that a spousal support waiver in a premarital agreement was void and unenforceable as against public policy. The trial court relied upon the Legislature's intentional omission of the portions of the UPAA that explicitly permitted spousal support waivers in premarital agreements. The trial court's order was also consistent with *Higgason*.

The California Supreme Court in Pendleton reversed the trial court, and contrary to its decision in *Higgason*, held that spousal support limitations and waivers were not invalid *per se*. The court cited legislative history, changing social mores, increasing employment of married women, the adoption of no-fault divorce, and the statutory "goal that the supported party shall be self-supporting within a reasonable period of time."

The *Pendleton* court upheld the spousal support waiver in the parties' premarital agreement, noting that both spouses had the advice of counsel before signing the agreement. At the time of the dissolution, each spouse had property worth approximately $2.5 million, both spouses had graduate degrees, and the court determined that both parties had an ability to earn income to be self-sufficient.

Taking a cue from dicta in the *Pendleton* decision ("[t]he Legislature may, of course, limit the right to enter into premarital waivers of spousal support and/or specify the circumstances in which enforcement should be denied"), the Legislature amended Family Code §1612, effective Jan. 1, 2002. The newly added Family Code §1612(c) codified two important hurdles for the enforcement of spousal support waivers. First, a premarital agreement provision purporting to limit or waive spousal support will be unenforceable unless the party was represented by independent counsel. Second, the Legislature added language explicitly acknowledging that a spousal support waiver will not be enforced if it is unconscionable, with unconscionability tested at the time of enforcement of the agreement. For many years, California courts provided no guidance regarding what circumstances might make a spousal support waiver "unconscionable."

Finally, in January, a California appellate court provided the first statement of its kind in *Facter* by affirming the trial court's ruling that the waiver of spousal support in that case was unconscionable, and therefore, unenforceable.

The wife in *Facter*, in stark contrast to the wife in Pendleton, was an unemployed "high school graduate with two minor children, living rent-free." Nancy Facter had no property of her own. Her husband, Jeffrey Facter, on the other hand, a Harvard-educated attorney, earned about $500,000 a year and had $3 million of separate property at the time of the marriage. Jeffrey Facter personally drafted the premarital agreement, telling his betrothed that the spousal support waiver was not negotiable.

During the parties' 16-year marriage, Nancy Facter, with her husband's assent, did not work or pursue a degree. Instead, she raised the children and maintained the family home. At trial, Jeffrey Facter's separate property was valued at more than $10 million and he had annual earnings of $1 million. His wife had no separate property and no income. Using a temporary "guideline" spousal support calculation as a measuring stick, the court found that the property that Nancy Facter would be awarded in the divorce would be "manifestly inadequate" to provide sufficient income for her support, making the spousal support waiver unconscionable.

As a caveat to the convoluted history of spousal support waivers, in Melissa, another California appellate court recently held that a 1985 spousal support waiver (prior to California's 1986 adoption of the UPAA) was invalid as being against public policy.

Melissa confirmed that "[t]he law applicable to the validity and enforcement of premarital agreements turns on the date of execution," concluding that *Higgason* controlled the parties' pre-1986 premarital agreement.

One lingering question after *Melissa* is whether *Pendleton*, which upholds a 1991 spousal support waiver, would also apply to premarital agreements signed between 1986 and 1990, while the law regarding spousal support waivers was "evolving." This is an open question that may demand clarification in the future.

In Practice

As family law practitioners, because spousal support limitations and waivers may be tested many years into the future, it is difficult to guess what will transpire. Traditional wedding vows hint at the possibilities. One spouse may develop medical issues and become unable to work ("in sickness and in health"). One spouse might earn millions of dollars — or might encounter unexpected debts or liabilities ("for richer or for poorer"). Or maybe the power couple will decide that one of them will stop working during marriage to raise children or manage the household ("for better or for worse").

So what can we do to draft a spousal support waiver with teeth? First, we can try to make the agreement fair. The wealthier spouse should consider providing sufficient consideration for the spousal support waiver, perhaps with the explicitly stated goal of creating a separate property estate to support the less wealthy spouse. This can be accomplished by providing for gifts during marriage. Moreover, we might include a clause stating that, in the event the spousal support waiver is later deemed to be unenforceable, the consideration for the spousal support waiver must be returned to the wealthier spouse. Obviously, this would only work in a situation where the gifts are set aside or preserved in a life insurance policy with cash value, or other investment vehicle for the benefit of the less wealthy spouse. Possible management by a trustee and provisions for intervening death may also need to be taken into account.

We can also include recitals describing the education and earnings of the parties and a statement that both parties have read and understand the agreement. We can take care to comply with the technical hurdles set forth in Family Code §1615, make sure both parties are represented by attorneys, and include certifications by the attorneys that their respective clients read and understand the agreement. We should have the parties' signatures notarized (especially when the agreement waives pension benefits) and, if the circumstances warrant, videotape the signing (perhaps even questioning the parties regarding competence, voluntariness and understanding).

When advising a bride-to-be or groom-to-be, practitioners should continue to warn clients that spousal support waivers are an evolving area of law with great uncertainty. However, Facter now provides us with at least one example of a specific set of facts that caused a California court to determine that a spousal support waiver was unconscionable and unenforceable.

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