Decision Weakens Enforceability of Spousal Support Waivers

By Frank Garfield
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Marriage of Facter (January 14, 2013) ___ Cal.App.4th ___ signals a development in the law that undermines the enforceability of the spousal support limitations and waivers that are authorized by the California Premarital Agreement Act, and incorporated into many prenuptial agreements.

Prior to 2000, it was widely understood that contractual limitations or waivers of the right to receive spousal support upon the dissolution of a marriage were against public policy. *Marriage of Higgson* (1973) 10 Cal.3d 476, 485. Significantly, the version of the Uniform Premarital Agreement Act adopted in California in 1985 permitted prospective spouses to contract with respect to their property rights, but was silent on their ability to contract with respect to their support rights. As a result, spousal support waivers and limitations were not expressly permitted or precluded.

In *Pendleton v. Fireman* (2000) 24 Cal.4th 39, the California Supreme Court effectively overruled the public policy previously promulgated by the courts, and upheld a spousal support waiver in a prenuptial agreement. "No public policy is violated by permitting enforcement of a waiver of spousal support executed by intelligent, well-education persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they execute the waiver." *Id.* at 53.

The Court's opinion was clear on three points: First, since the courts had created the public policy, it was subject to reconsideration and development by the courts. Second, the Court's ruling did not mean that all limitations or waivers would be upheld. "We need not decide here whether circumstances existing at the time enforcement of a waiver of spousal support is sought might make enforcement unjust." *Id.* Third, it was up to the Legislature to determine if waivers and limitations should be regulated by statute. *Id.* at n. 12.

In dissent, Justice Kennard noted that there was an absence of guidance for attorneys preparing prenuptial agreements to decide whether to include a waiver of spousal support along with an absence of guidance for trial courts reviewing prenuptial agreements to determine whether a waiver of spousal support is enforceable.

In 2001, the Legislature responded to the Court's opinion in *Pendelton* by enacting amendments to the Premarital Agreement Act. Section 1612(c) provided as follows: "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 provisions is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement." Section 1612(c) left the determination of unconscionability to the courts.

The Supreme Court's vague reference to "circumstances" that might make enforcement unjust was not clarified by the Legislature's confirmation that an unconscionable limitation or waiver of spousal support would not be enforced. The question remained: Under what circumstances would a limitation or waiver of spousal support be deemed unconscionable?

The absence of guidance about which Justice Kennard complained in *Pendleton* has now been remedied. In *Marriage of Facter*, the Court of Appeal relied on several circumstances in finding a spousal support waiver unconscionable:

First, at the time of the marriage, Husband was an accomplished attorney, a graduate of Harvard Law School, who earned roughly half a million dollars a year and had $3 million in separate property. Wife was a recently unemployed high school graduate with two minor children.

During the marriage, which lasted 16 years, Wife did not pursue her education or seek gainful employment; instead, she devoted her efforts to raising the children and maintaining the family home.

At the time of the divorce, Husband had separate property valued at more than $10 million and earnings of $1 million per year, whereas Wife had no separate property and no income. Under the agreement, Wife was entitled to half the net proceeds from the sale of the family home plus $200,000 payable over a five-year period. Based on these circumstances, the appellate court had "little difficulty in concluding that the Agreement's spousal support waiver is presently unconscionable."

The *Facter* court focused on the consideration payable to Wife pursuant to the prenuptial agreement: "Compared to what she is likely to receive in court-ordered spousal support, these assets are manifestly inadequate." This signals that appellate courts will compare the consideration to be received by a party under a prenuptial agreement with the amount of spousal support that party would have received if there was no agreement in determining whether a spousal support waiver is unconscionable.

When it comes to property, the *Facter* court stated: "In the context of prenuptial agreements, fairness, for better or worse, is not the touchstone. Instead, the focus is on disclosure of assets." This standard derives from the California Supreme Court's opinion in *Marriage of Bonds* (2000) 24 Cal.4th 1, noting that the Uniform Premarital Agreement Act was intended to enhance the enforceability of those agreements, and to convey the sense that an agreement voluntarily entered into would be enforced *without regard to the apparent unfairness of its terms* as long as the objecting party knew or should have known of the other party's assets. There is no suggestion in the *Facter* court's opinion that the parties' agreement with respect to property would have been set aside even if Wife had received no consideration for the waiver of her community property rights.

Spousal support waivers will be evaluated differently. If there is a significant disparity between the parties' assets and incomes at the time of a divorce, a spousal support waiver in a prenuptial agreement is likely to be deemed unconscionable. The *Facter* court had no trouble reaching this conclusion when Husband had a net worth of $10 million and Wife was only entitled to receive a few hundred thousand dollars in settlement of her property rights, and Husband had an income of $1 million per year and Wife had

no significant employment history, no income, and no realistic prospect of being able to earn more than the minimum wage.

The current state of the law in this area appears to be as follows: A waiver of all community property rights will be upheld so long as there was full disclosure and the agreement was signed voluntarily. The Courts will not concern themselves with whether the consideration for the waiver is adequate or whether the parties' assets are comparable – either when the agreement was signed or when the marriage ends.

In contrast, the appellate courts will apply a stricter standard to spousal support waivers. If a judge concludes that the waiver is unfair compared to the amount of spousal support that would have been payable absent a waiver, the waiver is likely to be deemed unconscionable and enforcement denied.

Practitioners have always known that a reasonable limitation on the amount and duration of spousal support is less likely to be deemed unconscionable than an outright waiver. In drafting prenuptial agreements, conscientious attorneys can no longer rule out the possibility that any waiver of spousal support will be deemed unconscionable if there is a significant disparity between the assets and incomes of the parties. For that reason, limitations on the amount and duration of spousal support will be preferred.

The provisions for lump sum payments in lieu of community property rights that have historically been included in prenuptial agreements may become relics of the past. Based on the guidance of *Facter*, practitioners will now be motivated to load the consideration for a prenuptial agreement into provisions for spousal support. The reason is simple: If a waiver of community property rights is enforceable regardless of how unfair or even unconscionable it may be, there is nothing to be gained from providing for lump sum payments upon the termination of a marriage. The money that would have funded those payments will be paid instead as periodic spousal support.

For example: In the past, a typical prenuptial agreement between an affluent husband a less affluent wife might have provided that Husband would pay Wife $100,000 for each full year of the marriage up to a maximum of $1 million plus spousal support of $10,000 per month for a period equal to half the length of the marriage. After a marriage of ten years, Wife would be entitled to $1 million in a tax-free lump sum plus a total of $120,000 per year in spousal support for five years. If the payor has a 40% marginal tax rate, the total cost of the consideration for the agreement would be $1,360,000.

Affluent husbands will now be concerned that $10,000 per month in spousal support may be deemed unconscionable if the parties enjoyed a $1 million per year lifestyle during the marriage. As a result of *Facter*, a comparable prenuptial agreement will replace a lump sum payment of $1 million with spousal support of $25,000 per month for half the length of the marriage. Following a ten-year marriage, husband would be obligated to pay $300,000 per year in spousal support for five years, a total of $1.5 million. After taking the tax consequences into account, the total cost to husband would be $900,000. While there are no guarantees, it is unlikely that $25,000 per month in spousal support would be considered unconscionable in all but a tiny percentage of cases.

The *Facter* court's laudable goal of avoiding a result it considered unconscionable in that case is likely to have consequences that the Court did not anticipate or intend.

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