

Can Spouses Waive Post-Marriage Support?

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Many people sign premarital agreements in an attempt to contractually determine their fate should "until death do us part" not become a reality.

As a family lawyer, I have been accused of becoming somewhat cynical about the likelihood of new marriages surviving in today's culture. This is probably because a substantial percentage of my time is spent reviewing, drafting and negotiating premarital agreements for men and women who want to avert the emotional and financial disaster that occurs when assets are

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fought over after a marriage fails.

Some people, after a short-term marriage, reluctantly stand by while the court awards one-half of their substantial wealth accumulated during the marriage to their spouse. This type of situation can be avoided by a premarital agreement that provides their spouse will not begin to accumulate a community property interest in property acquired during the marriage until a "waiting period," or certain term of years into the marriage.

Can premarital agreements define or waive the obligation of support upon divorce? All premarital agreements executed on or after Jan. 1, 1986 are governed by the provisions of the Uniform Premarital Agreement Act ("UPAA"). This act is found in the Civil Code at sections 5300, et seq. The original version of the Uniform Model Act specifically provides for the ability of the contracting parties to waive spousal support. Unfortunately, our legislators in Sacramento did not retain this provision in the California UPAA when they adopted the model act.

California Public Policy

This presents the concern as to whether California case law prior to Jan. 1, 1986, would continue to invalidate a spousal support provision in a post-Jan. 1, 1986, premarital agreement. This case law states a public policy in California that if the terms of an agreement tend to promote dissolution, then it is unenforceable.

There are two views on this issue. The first view is that since the model UPAA would generally permit spousal-support waivers in premarital agreements, and the California version of the UPAA left out this portion of the model act, then this strongly suggests that if the agreement limits or waives spousal support it would not be enforceable. The other view (and the

view of this author) is that the Legislature's silence on whether to preclude these types of spousal-support waivers should not be read as a mandate that spousal waivers are unenforceable. Instead, I suggest looking to pre-1986 case law that focuses on whether or not the agreement promotes divorce.

Not all waivers of spousal support would necessarily promote divorce. Conceivably, there can be a waiver that provides for a level of support upon termination of marriage that would be fair and equitable under the circumstances that existed at the time of marriage.

Let us assume that at the time of marriage Wife earns \$100,000 per year and Husband earns \$25,000 per year. They were married for 10 years and their premarital agreement provides that upon divorce Wife shall pay to Husband \$2,500 per month for five years as spousal support. Taking into consideration the respective earnings of each of the spouses, and the length of their marriage, this provision for spousal support does not appear to

ing the marriage." By analogy to this statute, courts could make their determination by looking at the standard of living of the parties during the marriage, and not at their standard of living at the time they entered into the marriage.

For example, taking the same husband and wife, what if after 10 years of marriage, Wife, who is a plaintiff's personal injury lawyer, now found that recent legislation had reduced her yearly earnings to \$50,000 per year, and Husband, who has been promoted within the corporate structure of his employer's insurance company, now earns \$75,000 per year. How would the court adjudicate the enforceability of their spousal support provision?

No Windfalls

Although the reported cases do not appear to deal with this issue, the court would probably look at the factual circumstances of Husband and Wife at the time of their separation and hold that their agreement is unenforceable. It promotes divorce because of the windfall that Husband would receive

separate property of the acquiring spouse. Civil Code section 5110.710. Premarital agreements are often used preventively to carve out those assets of either spouse that they brought into the marriage as their separate property and memorialize their understanding that this property shall remain their separate property, or that the income that may be derived from the property remain their separate property.

When characterizing the community or separate nature of assets acquired after the marriage, you must be careful to discuss with your client the concept that income received as a result of the client's efforts during the marriage is generally that of the community, and if this is to be transmuted to separate property the premarital agreement should specifically provide for this.

When clients learn that they can predetermine by agreement the separate or community nature of the property that they may acquire after marriage, many want to know if they can also agree prospectively as to what property they each will receive should their marriage end in divorce. Civil code section 5312(a)(3) appears to support this proposition by providing that spouses "May contract with respect to . . . the disposition of property upon separation, marital dissolution, death, or the occurrence of non-occurrence of any other event."

Civil Code section 5312(a)(7), however, also contains a general provision against including terms in the premarital agreement that violate public policy. It is likely that this prohibition would include property settlement agreements in premarital agreements that promote dissolution of marriage because of the disparity in their economic allocation of wealth and assets between the parties upon divorce.

Can't Promote Divorce

Although most of the cases that have dealt with this issue, such as *In re Marriage of Dawley*, 17 Cal.3d 342 (1976), and *In re Marriage of Noghrey*, 169 Cal.App.3d 326 (1985), were reported prior to Jan. 1, 1986, when the UPAA was first effective in California, the recent case of *In re Marriage of Daganit*, 204 Cal.App.3d 1387 (1988), a post-UPAA decision, is consistent with the common law proscription against agreements that promote divorce.

In conclusion, premarital agreements are in many ways a viable mechanism for prospective spouses who want to determine by agreement the character and disposition of their property should their marriage fail. When advising clients as to the enforceability of support provisions and other terms that may be held to be against public policy, be sure to explain to them the inconsistency in the law.

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promote divorce and might be enforceable.

But what if these same parties had an identical provision for support in their premarital agreement, but their marriage only lasted 12 months? This scenario would appear to promote divorce since it would result in an unfair windfall for the husband, who after only one year of marriage would receive a total of \$150,000 in spousal support over five years. This disaster could have been avoided if the attorney who drafted the agreement had graded the spousal support provision so that the initial monthly amount of support began in smaller increments and increased over the length of the marriage, or had the attorney made the period over which the support payments were to be paid proportionate to the number of years that the parties stayed married.

There still is an issue that one must consider when trying to second guess how a court would analyze a support provision upon dissolution. Will the court's inquiry as to whether a support provision promotes divorce focus on the relative status of the parties at the time the parties entered into the contract (usually just days or hours prior to the marriage), or at the time of separation?

Civil Code section 4801(a) was recently amended in 1988 to require that a court, in determining spousal support upon divorce, base its award "on the standard of living established dur-

by enforcing the spousal support provision against Wife based on their comparative incomes at separation.

If the spousal-support provision or spousal-support waiver or any other term of the premarital agreement is held to be in violation of public policy and is inseparably connected to other provisions of the agreement, the entire agreement may be unenforceable. However, if the agreement is drafted so that the provision against public policy is severable from the other provisions of the agreement, then the other provisions are enforceable. Civil Code section 1599. Good practice dictates that every premarital agreement include a severability clause that provides that if any provision is unenforceable as against public policy, then it should be severed, and the remaining provisions of the agreement should be enforced.

Besides establishing spousal-support provisions, premarital agreements can be used to allocate future property rights. The ability to define future spouses' rights to property they may acquire after marriage is important.

Civil Code section 5110 defines all property acquired during marriage, except that property acquired by gift or inheritance, as community property. Premarital agreements can be used to transmute the character of property acquired during marriage to insure that property acquired by either spouse during marriage will be the

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