

The Practitioner Family Law

Without a Net

Supreme Court to Tackle Issue of Enforceability of Support Waivers

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The California Court of Appeal, in an opinion to be reviewed by the California Supreme Court, issued a ruling that seems contrary to long-standing California public policy on the issue of premarital agreements. The court in *Marriage of Pendleton*, 72 Cal.Rptr. 840 (1998), held that waivers of spousal support in a premarital agreement are not unenforceable per se. If this decision is affirmed, it will become a landmark opinion. The petition for review before the Supreme Court was filed on May 4.

The facts of the case are brief and straightforward. Prior to marriage, the parties entered into a premarital agreement. The parties are wealthy and well-educated, and each was represented by separate counsel. The agreement included a waiver of spousal support, which, in the words of the opinion, stated that "in the event the marriage did not last until death did them part, neither would seek spousal support from the other."

After four years, the marriage was dissolved. The wife, contrary to the agreement, sought spousal support. She claimed that the waiver of support was unenforceable. The trial court agreed with the wife and held that all such waivers are per se unenforceable. The husband was ordered to pay spousal support.

The Court of Appeal reversed and held that waivers of spousal support are not per se unenforceable, and it remanded the case to the trial court for a determination of the enforceability of the waivers.

The court's reasoning revolved around the passage of California's Premarital Agreement Act in 1985 and a comparison of California's act with the Uniform Premarital Act. (California's act is found at Family Code Sections 1500-1620.) The Uniform Premarital Act contains a provision allowing the parties to "contract with respect to ... the modification or elimination of spousal support."

The version of California's premarital act

originally proposed contained this provision allowing the waiver. However, upon the recommendation of the legislative staff, the provision was deleted. The opinion cites portions of the legislative reports as follows: "California's courts did not permit a premarital agreement to control this issue [of waivers of spousal support] ... Thus, the amendment deleting [the provision allowing such waivers] was recommended to 'allow California case law to continue to prevail on the issue of spousal support in premarital agreements.'"

The court interpreted these statements from the legislative reports as authorizing the courts in the future to determine this issue. The opinion states: "It is clear, therefore, that the Legislature deleted the express authorization for spousal support waivers because they recognized that the enforceability of such waivers is a question for the courts, not the Legislature." The legislature has thus "given [the courts] the green light to recognize the simple fact that premarital spousal support waivers and limitations no longer violate public policy."

The case then re-examined whether or not such waivers would violate public policy and concluded that they would not. Initially, provisions limiting support in a premarital agreement were unenforceable as promoting divorce. This rule was developed in the context of divorces granted only upon proving fault. The payments were seen as a type of liquidated damage provision. If the full extent of the payments one spouse would have to pay the other upon divorce was limited, then one spouse could inflict all sorts of "evils" upon the other spouse. This limited liability would encourage some people to inflict injury.

The court then observed that numerous, important changes have occurred since the above rule prohibiting waivers was formulated. The "fault" system of divorce was changed

to a "no-fault" system. Second, the husband's unilateral right to manage and control all the community assets changed to an equal management system. Third, equal division of the community was mandated; previously, unequal division was ordered sometimes to punish "the guilty party for adultery, extreme cruelty or incurable insanity."

The court noted that even after these major changes, no court had re-examined the present issue. Finally, the California Supreme Court decision that the Legislature relied upon to determine that support waivers were unenforceable, *Marriage of Dawley*, 17 Cal.3d 342 (1976), was decided before these major changes to California family law. Therefore,

a system of laws that allows a prospective spouse to make premarital decisions controlling the disposition of all of the spouse's property upon death — which may leave the surviving spouse without any form of continuing support — but prohibits premarital decisions controlling support obligations if the marriage ends in divorce."

Finally, the court considered the social changes that have occurred that argue in favor of allowing the waivers. Roughly one-half of all marriages now end in divorce, and, according to the court, people should be able to plan their finances. More people marry later in life now than in the past, with women entering the work force with the intent to remain as professionals and executives. Ironically, if premarital agreements do not allow waivers of support, some people may decide not to marry. Allowing the waivers may actually encourage some people to marry. (On the other hand, allowing people to waive property and support would appear to make divorce painless and easy, which may encourage these same people to divorce.)

In short, the court concluded that since there is no reason to prohibit waivers of support, "those who choose to resolve their financial responsibilities before marriage ought to be able to do so." Adequate safeguards can be provided by the courts and Family Code Section 1615, which deals with the enforceability of premarital agreements in general.

That section requires that the party must execute the agreement voluntarily; the agreement must not be unconscionable; a fair and reasonable disclosure of the property and financial obligations of the other party must be provided (or these disclosures must be waived in writing); and waiving party must have adequate knowledge of the property or financial obligations of the other party. (Since at the time Family Code Section 1615 was passed, a party could not waive or limit

spousal support, that section may not provide adequate protection for such waivers and limitations.)

A leading commentator on California family law reaches the opposite conclusion as the court in *Pendleton*. See "California Practice Guide: Family Law" Paragraph 9:22 (The Rutter Group 1998). The treatise reasons that since the Legislature deleted the provision of the Uniform Act, which allows waivers of support, the Legislature must have intended that support could not be waived in a premarital agreement. This is called the "better view." The treatise describes the "more dubious view" as "permitting prospective spouse's to waive for fix the marital spousal support duty so long as their agreement is fair and equitable."

Certainly, there is no clear answer to this issue. On the one hand, there is an important distinction between property rights and support. A person who waives property rights still may not be left on the street if he or she can be awarded support. Also, a person still needs money to pay expenses after a divorce, even if property is equally divided.

If the appellate court is upheld, one problem will be determining if a person truly understood the rights he or she was giving up and the consequences of that choice. As the court in *Pendleton* notes: "[O]ur decision in this case suggests a need for legislative reexamination of the enforcement issues." On the other hand, the logic of *Pendleton* may be inescapable: If a person can waive the right to a share of community property, then he or she should be able to waive the right to support.

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the court concluded it was not controlling.

Allowing spouses to waive support in a premarital agreement is consistent with other related laws. Parties are allowed to waive a right to a family allowance from the other's probate estate where there are no minor children. Also, as long as minor children are not affected, a premarital agreement may limit a spouse's rights to all aspects of property. Since the parties can enter into contracts waiving a family allowance and property rights, the court reasoned, they should be able to waive support rights.

The court stated: "The decision to marry is among the most personal and private choices that two people can make, and there is something perverse about

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